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The contemporary ideological legitimacy of global intellectual property rights

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Abstract

This article draws upon three theoretical arguments to frame the ideological nature of global intellectual property rights. The first is the work of Robert Merges on the justification of intellectual property rights. The second work is the work of the early twentieth century American legal scholar Wesley Hohfeld and his theory on "conceptions of property". The third work is that of John Rawls and his approach to "pluralism". These works have a common theme in that they help to frame or conceptualise intellectual property rights in certain ideological existence I argue. The article explains that this ideological existence relates to how intellectual property rights are supported at the global level as instruments of private property governance. The article assesses, for instance, how intellectual property rights in international instruments such as the TRIPs Agreement are seen as part of the ideological paradigm that maintains a "a right to property" beyond the state, but also compare how domestic participants such as farmers also believe they have a "right to property" in patented seeds owned by multinational corporations. The result is that both the domestic and international legal structure does not allow for alternative justification of intellectual property rights.

A. Introduction

Can international intellectual property rights be justified? If so, what are the arguments to make such justification: legal, economic, or philosophical? The very concept of *international intellectual property rights* is, in itself problematic, as it suggests that there are certain forms of property rights that are transferable beyond the sovereign state. Moreover, determining the actuality of intellectual property as a form of *property* adds another layer of relationship with various interpretations. Another concern is the complexity of the relationship between legitimacy and intellectual property rights as ideology. This article address some of these questions.

Given that the global intellectual property regime is a *system of rights* that are embodied in international treaties such as the TRIPs Agreement in the World Trade Organisation (WTO); then, the economic and legal aspects of these system of rights are essential in how as private rights, they transform and privatise public international law. That transformation, as argued elsewhere in this article, seeks to functionalise international law at the behest of private economic interests at the global

♠ Portions of this paper was largely inspired by, Justine Pila, "Pluralism, Principles and Proportionality in Intellectual Property" (2014) 34 *Oxford Journal of Legal Studies* 181. This article was first written in October 2017 as part of a broader project on the privatisation of international law from an intellectual property perspective. This version was revise in 2019. The author would like to thank Jan Klabbers for comments on an earlier draft of this article and two anonymous referees of this journal for their feedback. Margaret Llewleyn has been patient and ever gracious as usual.

level. These private economic interests are the owners of intellectual property rights through the corporate structure of domestic and international trade.

A crucial question that the transformation and privatisation of public international law through global intellectual property rights raise is, whether, or not, intellectual property is fair, or, if there is justice in intellectual property rights. In order to address this question, then, it is necessary to discuss modern theories of property rights from an intellectual property perspective. Hence, the core of this article is (a) an examination of intellectual property rights against contemporary theories of justice and fairness, and (b) modern private rights in intellectual property.

The theoretical and philosophical arguments addressed in this article are not so much to set the contours for predetermined conclusions. Rather, the theories on intellectual property allows for a broader debate when addressing the *pros* and *cons* of global intellectual property rights; and also, taking into account, the relevance of domestic rules and functions of international rules in relation to rights in intellectual property. Furthermore, the theories on intellectual property rights in this article are partly taken from real property theories and their interconnection for the modern world.[1] Given that global intellectual property rules are *codified* in the TRIPs Agreement as *private rights*,[2] then, international law can no longer be viewed as the sole domain of nation states. Instead, international law must be seen in a new light: a right to consider how private rights are transposed beyond the borders of sovereign states, and the response to any *fundamental* right to intellectual property.[3]

B. A contextual overview on the classical Lockean notion of property

Questions on the notion of property in western legal tradition have been, and remains, deeply rooted in theories of property as developed by John Locke (1632 – 1704).[4] Locke's work, in particular the labour market thesis, continues to inspire and divide scholars given the various interpretations of Locke's work, and also how to properly interpret the exact arguments that Locke tried to convey.[5] Nonetheless, it is difficult to discuss *private* property rights without reference to Locke's thesis on labour (natural rights). Indeed, Locke's contribution has been refined and expanded upon in many works; and his influence on private property rights over the centuries has impact legislations and other normative acts regulating property. But my discussion of Locke's labour theory in the next few paragraphs is not a rejection or appraisal of the theory. Rather, it is to contextualise the theory in relation to intellectual property and ultimately exclude it from the trajectory of this article. This is so because my focus is on the *modern* theories of Wesley Hohfeld (1879 – 1918),[6] John Rawls (1921 – 2002), and Robert Merges (b. 1959).

By focusing on twentieth century theories of property and their transposition to intellectual property, the article is better able to demonstrate that property rights accelerate the privatisation of international

[1] Eg., Harold Demsetz, "Toward a Theory of Property Rights" (1967) 57 *American Economic Review* 347; Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001); Robert Merges, *Justifying Intellectual Property* (Harvard University Press, 2011).
[2] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Annex 1C of the Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1869 UNTS 299, 4th recital; *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (WT/DS362/R) 26 January 2009 [7.247] where the panel confirmed that provisions of the TRIPs Agreement reflects private rights.
[3] *Phillips v Mulcaire,* [2012] EWCA Civ 48, [10] defining intellectual property.
[4] John Locke, *Two Treatises of Government* (2nd edition, CUP, 1967) (P. Laslett ed), chapter 5.
[5] Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford University Press, 1995).
[6] Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16.

law.[7] Although international law has been linked to the property dimension by classical scholars such as Hugo Grotius (1583 – 1645), Samuel von Pufendorf (1632 – 1694), Jeremy Bentham (1748 – 1832), Immanuel Kant (1724 – 1804) among others,[8] the emphasis in this article is the modern context. However, it will be shown that classical property rights theories influences modern legal scholars approaches to property rights; and similarly, modern conceptions of property rights further influences liberal theories and legislations on property.[9] The transposition of the real property narrative to justify intellectual property is then evident in the philosophical dimension of property that is grounded in Lockean approaches that permeates contemporary *Rawlsian liberalism* and *Mergesian pluralism* (discussed further below).

Locke in the *Second Treatise* develops an argument that there is a natural right to property, or, as he writes: "every man has a property right in his own person."[10] This brief and artificial phrase articulates two things: a *form* of intellectual creativity (because of natural resources), and the *right to own* that intellectual creativity (as a form of property). The reason for this, as Locke notes, is that, where a person "hath mixed his labour with and joined it to something that is his own",[11] he then "makes his property"[12] and as such, reflects human productiveness. Although Locke was writing in an era when majority of the land (real property) was owned by the English nobility, the very resources on the land, were in a way *common* to nature and thereby accessible for everyone. However, there is another way that Locke's labour theory can be interpreted. Seen differently, Locke was defending the nobility's ownership of the land and its resources for the *use in trade and commerce*.[13] This interpretation is more suitable for making the connection of Locke's labour theory to *real property* rights in intellectual property in the modern sense.[14] But as we shall later see in this article, the modern theoretical thoughts of Rawls, Hohfeld and Merges are also Lockean in that they relates to liberalism, *value fairness* and forms a cohesive chain that reflected theories on property rights over the centuries.

Nevertheless, in broader terms, Locke's natural rights approach to property is a form of exclusive right – a private right that generates legitimacy through the participation of government through laws and regulations. This should be viewed against the broader context of Locke's work as he was giving a general account of government and in that regard, the *natural* right to property reflects the rationality of civil government and economic spill-overs.[15] But more specifically, Locke, in his treatise saw labour as the source and origins of private property and thereby a "rational justification for property in the products of the earth."[16] Locke's treatment of private property resonates well throughout the

[7] P. Sean Morris, "From Territorial to Universal: The Extraterritoriality of Trademark Law and the Privatizing of International Law" (2019) 37 *Cardoza Arts and Entertainment Law Journal* 33; "To What Extent do Intellectual Property Rights Drive the Nature of Private International Law in the Era of Globalism?" (2019) 28 *Iowa Transnational Law & Contemporary Problems* 421.
[8] Munzer (n 1) 1.
[9] *Ibid*, noting that Hohfeld influence on academic lawyers is evident in the American Law Institute, *Restatement of the Law of Property* (St. Paul, Minnesota, 1944).
[10] Walton Hamilton, "Property – According to Locke" (1932) 41 *Yale Law Journal* 864, 867.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid*, 868.
[14] Eg, Edwin Hettinger, "Justifying Intellectual Property" (1989) 18 *Philosophy and Public Affairs* 31; Adam Moore, "A Lockean Theory of Intellectual Property" (1997) 21 *Hamline Law Review* 65.
[15] Matthew Kramer, *John Locke and the Origins of Private Property: Philosophical Explorations of Individualism, Community, and Equality* (CUP, 1997) 118; 118 – 127; Barbara Arneil, *John Locke and American: The Defence of English Colonialism* (OUP, 1996).
[16] Arneil, *ibid*, 137.

centuries with wealth maximisation and innovation. This, despite Locke's critics[17] who have suggested that his treatment of natural rights and private property rights are inconsistent.[18]

The progress of economic development, expansion of wealth, democratic liberalism and intellectual innovation over the centuries, however, I believe vindicates Locke, despite his critics: private property is acquired through the mixing of labour and *common* resources. The question now becomes, how to move away from the Lockean conception or theory of property, to connect international intellectual property in the modern sense; and whether questions on justice or fairness affects the notion of property. However, to address that question on the contemporary legitimacy of intellectual property rights in the international intellectual system, it is best to address theories on property by twentieth century contemporaries. Furthermore, by the time rules at the global level regulating intellectual property rights were implemented in the TRIPS Agreement, the legitimacy of those rules was already being questioned in the context of justice and fairness.

To examine these arguments in greater detail, the works of Hohfeld, Rawls and Merges are discussed to draw parallels or establishes the unbroken chain of property rights in the classical Lockean sense. But, given Locke's view that the use of private property is restricted, it can also be said, that international intellectual property rules allows for the restricted use of the right to property in creative innovations and goods at the global level. If this is the case, then, a concern is whether creative innovations and goods at the global level are *common goods*, or, are they, private goods governed by (public international) law. If they are seen as common goods how useful then is the Lockean approach? But, on the other hand, if property rules recognise them as *private goods*, how should the international rules respond? Will there be the need to resort to private law rules? I argue that the modern approach to property rules in intellectual property and their justification is the proper analysis as opposed to the classical Lockean approach given that *new* forms of property and norms presents new opportunities for justifying fairness and property in modern creative innovation and goods.

C. Rights to intellectual property and contemporary theories of justice and fairness

How does intellectual property fit in the modern world; and especially, how does one separate the *property* in patents, copyrights or trademarks from the rigidity and restrictiveness of tangible property? Is it really possible to differentiate the restrictiveness of tangible property from intellectual property, when, like tangible property, intellectual property rules endowed restrictiveness and monopoly rights? What if there are no suitable answers to these questions can intellectual property rights be justified, and if so, are there avenues in which one can search for justifications? If not, are there any alternatives theories that can justify the property regimes of copyrights, patents and trademarks? These are difficult questions that I cannot pretend will be addressed in their entirety in this article but an exposition into the foundational elements of modern theories can help to shape the correct dialogue.

From the standpoint of the academic literature two works stands out in terms of addressing some of the questions that I raised in this article in the context of intellectual property. An edited collection in 2008 by respected scholars – *Intellectual Property and Theories of Justice*;[19] and a remarkable expository monograph by Robert Merges – *Justifying Intellectual Property*[20] – have managed to provocatively expose the intellectual property paradigm in theories of justice. This is not to say that

[17] James Truly, *A Discourse on Property: John Locke and His Adversaries* (CUP, 1980); Ross Harrison, *Hobbes, Locke, and Confusion's Masterpiece* (CUP, 2003) 244.
[18] Sreenivasan (n 5) chapter four in general "Limitations of the Original Theory."
[19] Axel Gosseries, Alain Marciano and Alain Strowel (eds), *Intellectual Property and Theories of Justice* (Palgrave MacMillan, 2008).
[20] Robert Merges, *Justifying Intellectual Property* (Harvard University Press, 2011).

there aren't other works that address the theoretical and philosophical nature of intellectual property and justice in broad terms, on the contrary, there are plenty works.[21] However to manage the discussion in this section, my comments are restricted to the two mentioned above because of their contribution to the debate.

The editors and contributors of *Intellectual Property Theories of Justice* for instance addressed some of the very same questions that I am attempting to in this article. The contributors looked at some of the conditions under which intellectual property is fair and the differences between real property and intellectual property. Sensing the fragmented nature of justice; the contributors and editors in *Intellectual Property Theories of Justice* provided thematic elements of justice and their connections to rights in intellectual property. As such, the volume conceded that focusing "exclusively on theories of justice for which the concept of property is more central" was unavoidable.[22] This conclusion is important, as it, corroborates the argument that property rights are private rights as opposed to *common* goods, and therefore, responds better to private (international) law rules..

Merges' *Justifying Intellectual Property* adds essential analysis and a rigorous investigation of justice and intellectual property. Merges objects to the property model in intellectual property law and develops a theory of intellectual property based on the Rawlsian concept of foundational pluralism.[23] Merges' work is more radical than *Intellectual Property Theories of Justice* in that be broadens the conception of property based on pluralism. Thus, seen in a different light, a pluralistic approach to (intellectual) property, then requires a broader system of law than the narrow private law approach. Hence, for rules to respond adequately to the pluralistic conception of property – an established system of customary rules, could, in theory, be appropriate. But, it is Merges' *pluralistic* principles-based theory of intellectual property as derived from critical examinations of the philosophy and theories of property that motivates me to (a) offer my own analysis of the ideological formations of intellectual property in this article. Another motivation is to (b) propose later in this article that the pluralistic constellation of sovereign states in the international order allows private rights holders to use intellectual property to privatise public international law.[24]

But before getting into those discussions the relevance or contributions of theories of justice must be examined in their contemporary setting. I will examine three contemporary approaches to rights and how they relate to justice, fairness and intellectual property. I will begin with (a) the *Hohfeldian conceptions of rights* and property. Hohfeld has had influence not only on the legal scholarship but also legislative norms in property such as the *Restatemen*t in American property law. The second approach is (b) the *Rawlsian system of liberalism*, where, Rawls advocates rights in a liberal democratic system as *principles*. And the third approach (c) how Merges, an American legal scholar justifies intellectual property based on *pluralistic principles*. The goal is that by offering these discussions, intellectual property from the perspective of real property can be seen in an objective manner (or justified). Another goal is to open up the corridor of intellectual property on the international legal plane including how specific regimes such as trademarks, patents or copyrights shapes private rights obligations in international law.

1. Hohfeldian concepts of property and rights

[21] Eg, Peter Drahos, *A Philosophy of Intellectual Property* (Dartmouth Publishing, 1996); Alexandra George, *Constructing Intellectual Property* (CUP, 2012); Annabelle Lever (ed), *New Frontiers in the Philosophy of Intellectual Property* (CUP, 2012).
[22] Above (n 19) 8; John Sanders, "Justice and the Initial Acquisition of Property" (1987) 10 *Harvard Journal of Law and Public Policy* 367.
[23] Merges (n 20) 5 – 10.
[24] See (n 7).

The American legal scholar Wesley Newcomb Hohfeld (1879 – 1918) is perhaps not that well known. Yet, he is forever associated with the American Law Institute and the Restatement of the Law on Property. Shortly after Hohfeld's death in 1918, the US Supreme Court ruled in *INS v AP* that there are "quasi-property rights" in news.[25] At the heart of the *INS v AP* case was the nature of property and its application to the copyright regime of intellectual property. The notion of property in *INS v AP* was both Lockean and Hohfeldian. Lockean, in that the Court endorsed the labour theory that creators are allowed to reap the gains from the property of their creation.[26] The decision was also Hohfeldian in that it acknowledged the Hohfeldian language of rights and privileges (although lacking engagement).[27] It was also Hohfeldian in the sense that the Court explained that quasi-property exists in news "irrespective of the rights" that both parties claim.[28]

Hohfeld main intellectual work – "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" was first published in 1913[29] and later expanded in 1917 where he developed a system of *jural* relations in which he analysed legal rights.[30] Hohfeld's "Fundamental Legal Conceptions" dissects a bundle of rights which underpins property in general. For Hohfeld, the notion and usage of rights, in relation to property (and the broader common law system) are not only correlated but the various concepts that denotes rights share a specific jural relation (legal right). The jural relations that Hohfeld developed covers "privilege", "right", "power", "no-right", "liability", "immunity", "disability", and "duty".[31] These jural relations, or as I sometimes refer to them as, *Hofeldian cells*, are seen as the natural embodiment of property rights because they link human economic activities to an efficient society where economic relation are dependent on the legal claims to labour and resources. The eight Hohfeldian cells on the legal discourse of a legal right remain pillars of the foundations of law and rights in the contemporary Anglo-American context and influences new forms of property rights such as those in intellectual property.

The *rights* in intangibles such as intellectual property are difficult to claim without invoking Hohfeldian cells on legal conceptions, and in this regard, rights in real property are no different from rights in intangibles. In other words, Hohfeld's legal conceptions are a like an inter-stellar system where all planetary bodies can invoke a legal relation with other interplanetary systems by using the language of *law* and *legal rights* to make a claim.[32] For Hohfeld, property is the primary biological structure in which the *cells* on rights can form a living object in order for a claim of ownership, or, the legal right, to be asserted. If, property, as the biological object for which rights can be asserted through the cells on legal claims, then property (and all asserted rights) is unstable. Hohfeld was actually suspicious of property as a legal structure because it "has no definite or stable connotation."[33] Therefore, because property, for Hohfeld was *Janus-faced* in character: "sometimes it is employed to

[25] *International News Service v Associated Press*, 248 U.S. 215 (1918).
[26] *Ibid*, noting that there is a "right to acquire property by honest labor."
[27] *Ibid*, 235.
[28] *Ibid*, 236.
[29] See (n 6).
[30] Hohfeld has been one of the most influential thinker in American legal thought and he has been credited for his analytical brilliance of rights where he focused especially on the internal structure of legal rights: see Hohfeld (n 6); Hohfeld later built upon his 1913 work with a follow-up article, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 *Yale Law Journal* 710 – 770. But see John Salmond, *Jurisprudence or the Theory of the Law* (London: Stevens and Haynes, 1902) discussing similar *rights* as Hohfeld; Andrew Halpin, "Hohfeld's Conceptions: From Eight to Two" (1985) 44 *Cambridge Law Journal* 435.
[31] Hohfeld (n 6) 58 referring to the eight conceptions as "the lowest common denominators of the law."
[32] *Ibid*, noting that legal positions are reduced to the "lowest generic conceptions to which all 'legal quantities' may be reduced."
[33] *Ibid*, 21.

indicate the physical object […] the word is used to denote the legal interests" in relation to physical object,[34] then property must be viewed through some *claims-right* system.

I believe that it is the enigmatic structure of property rights, that is, a relation to legal interests and its lack of stability in the universe of rights that allowed Hohfeld to develop the fundamental legal conceptions as both jural opposites and jural correlatives[35] where *law* and *rights* are generally applied to property.[36] In this regard, Hohfeld saw the jural correlatives of *rights and duties* not only incorporating property in its biological structure but also power, privilege and immunity. Actually, Hohfeld relied on an 1852 ruling by the New York Supreme Court, *People v Dikeman*,[37] which said that right, in the legal sense, applies to "property in its restricted sense, but it is often used to designate power, prerogative, and privilege."[38] Here, we can determine that Hohfeld through his merging of *legal interest* in property as a system of rights that includes, for example, powers and privileges, allows for the complex structure of rights that exists in property, to be better understood in order to determine "the correct solution of legal problems."[39] Hohfeld's work, has been the subject of numerous analysis and criticisms,[40] yet, his work continues to be essential in how rights are determined not only in real property but the *offshore* intangible of intellectual property.[41] I will return to intellectual property in the Hohfeldian realm later in the article, however, before doing so, it is worth to put into context Hohfeld's normative realm of rights in property and how those rights are transpose to other legal realms.

So far, we have seen that Hohfeld developed a system of rights that is based on eight conceptions that are narrowed down to four relations: "powers", "immunities", "claims" (rights) and "privileges" (liberties). Not all these uses of rights can be addressed in this article, but, for the broader purpose of this work, the Hohfeldian notions of *claims* (rights) and *privileges* (liberties) needs some elaboration and juxtaposition among the systems of rights in broader legal relations. Moreover, Hohfeld himself conceded that it is only proper to refer to a claim as a right because of a *proper* legal relation.[42] Nevertheless, in the Hohfeldian world of rights-claims, these are legal rights that correlates to legal duties,[43] and liberty correlates with the absence of a legal duty.[44] In other words, a claim-right is distinctive and different from a liberty-right and failure to make the distinction would amounts to nothing but a *fallacy*.[45]

But the important thing in understanding Hohfeld, in particular, when discussing rights (claims), especially from a legal perspective, is to approach rights-claims as "legal relation which is most properly called a right or claim" as Hohfeld illustrates in his own words.[46] This is so because Hohfeld's *logical system* of rights are meant to be applied during jural relations, that is, the law and its applicability over claims of legal rights between X and Y (rights and duties held by individuals

[34] *Ibid*. See further at 22, noting that land is not property and property in a legal sense refers to "the rights of the owner in relation to it" (*citations omitted*).
[35] *Ibid*, 30.
[36] *Ibid*.
[37] *People v Dikeman*, 7 How. Pr. 124 (1852), *cited* in Hohfeld, *ibid*. See *Blades v Higgs* (1865), 11 H. L. Cas, 621: "Property *ratione privilegii* is the right by which a peculiar franchise anciently granted by the Crown, by virtue of prerogative", as *cited* in Hohfeld, *ibid*.
[38] Hohfeld (n 6) 30.
[39] *Ibid*, 19.
[40] See (n 30).
[41] Hohfeld cited and quoted at length, JB Ames, "Purchase for Value Without Notice" (1887) 1 *Harvard Law Review* 1, 9.
[42] See, *infra* (n 46).
[43] Stephen Hudson and Douglas Husak, "Legal Rights: How Useful is Hohfeldian Analysis?" (1980) 37 *Philosophical Studies* 45.
[44] Hudson, *ibid*, 46.
[45] Hohfeld (n 6) 19.
[46] *Ibid*, 33.

against other individuals, *in personam*) or A, B, C versus D (or rights and duties held against multiple individuals, *in rem*). In the absence of a legal rights claim, then it makes no sense applying Hohfeldian logical system of rights, rather, other systems of rights that are broader or *moral* rights,[47] would be more appropriate.[48] Thus, the Hohfeldian notion of rights are legal rights to ownership (property) and for the purposes of this article, such property, extends to *offshore properties* such as intellectual property, to which, a claim, in the strictest sense of a right exists (discussed in detail below).

One of the more legalistic and definite statement by Hohfeld regarding the correlatives of rights is that legal relations are, *properly*, a right[49] and this statement resonates with complex legal questions that are raised in courts and tribunals within and beyond the nation state. So, where does Hohfeld's concepts of rights interact with the external world outside of the narrow jural relations of the domestic state? This article argues that such interaction is in Hohfeld's treatment of rights *in rem* – and its *multital* appeal, given that *in rem* rights reside in a single person or group of persons.[50] Hohfeld's treatment of *in rem* rights took on more significance in his 1917 article where he used a good amount of case law to demonstrate that *in rem* rights are more appropriate as methodological "tools for the comprehending and systematizing of our complex legal materials."[51] The shift to the case law analysis in the 1917 article was to present the jurisprudence of rights as originally sketched in 1913 in more practical terms that the *dispensers* of the law: judges and lawyers could more easily absorbed in the expanding field of judicial opinions and statutes.

One key claim by Hohfeld on rights *in rem* was that "a multital right, or claim, (right in rem) is not always one relating to a thing, i.e., a tangible object" as such. Rather, he suggested, right also extends to regimes of intellectual property such as books (copyrights) and patents.[52] Hohfeld explained: "Multital rights (or claims) relating neither to definite tangible object nor to (tangible) person, e.g., a patentee's right, or claim, that any ordinary person shall not manufacture articles covered by the patent."[53] Hohfeld's identification of rights in intangibles (*offshore properties* in this article or the intellectual property regime) was to enable the legal interpretation of rights in such a way that the law apply correctly from a rights perspective in the cases that the Courts were confronted with. Moreover, it was also a way of enabling the content and structure of the law to be more *people friendly* and not too distant from the needs of the society. Thus, rights in intangibles both by a single member in society and also rights in intangibles by a group of members (corporate) in society are, *simply* rights, protected by statutes. Therefore, both rights-claims (and privileges) are legal interests in property,[54] including intangibles,[55] and enjoy the jural relations created by statutes.

When the US Supreme Court was confronted with the question of *property* in news in *INS v AP* it framed quasi-property as a form of right in a traditional sense that harboured Hohfeldian rights. The *INS v AP* decision was made in the midst of the Hohfeldian debate on the concept *rights*. Furthermore, the way the Supreme Court decided the matter suggest a number of things. Firstly, the quasi-property right in the news directly relates to rights-claims and secondly, "the right to acquire property by honest

[47] Eg, Gopal Sreenivasan, "Duties and Their Direction" (2010) 120 *Ethics* 465; Joel Feinberg, "Duties, Rights, and Claims" (1966) 3 *American Philosophical Quarterly* 137.
[48] See Eleanor Curran, 'Blinded by the Light of Hohfeld: Hobbes's Notion of Liberty' (2010) 1 *Jurisprudence* 85; Arthur Yates, "A Hohfeldian Analysis of Hobbesian Rights" (2013) 32 *Law and Philosophy* 405.
[49] Hohfeld (n 6).
[50] *Ibid*; Christopher Newman, "Hohfeld and the Theory of In Rem Rights: An Attempted Mediation" George Mason Legal Studies Research Paper No. LS17-07, 15 September 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925392.
[51] Hohfeld (1917) (n 30) 712 – 713, and at 718 explaining right *in personam* and "*multital* right, or claim, (right in rem)". Further at 724, Hohfeld cited at length, Stephen Leake, *Law of Property in Land* (1st edition, 1874) 1 – 2.
[52] *Ibid*, 733.
[53] *Ibid*.
[54] Pavlos Eleftheriadis, "The Analysis of Property Rights" (1996) 16 *Oxford Journal of Legal Studies* 31 (framing property rights in Hohfeldian language for the purpose of regulation).
[55] James Wilson, "Could There be a Right to Own Intellectual Property?" (2009) 28 *Law and Philosophy* 393.

labour"[56] which "cost its producer money"[57] links to rights-privileges. Then, thirdly, the market value in the news "for which those who have it not are ready to pay"[58] correlates with rights-immunities, and fourthly, as property, the need for protection is an entitlement of the producer that correlates with rights-power. Schematically, this should appear as follows:

Right	Privilege	Power	Immunity
"quasi-property in news"	"labour/money" production of news	"entitled to protection"	"market value in the news"

The above (table) interpretation is possible given that Hohfeld's conception of rights are jural relations of multiple rights. Yet, the co-incident of the Hohfeldian concepts with the reasoning of the court in *INS v AP* suggest that the broader customary rules in society that transcends nations were integral to the Court's reasoning. These customary rules are to protect property from external infringement and enforce rules (contracts and treaties) between parties.[59] Moreover, a key point to be made from this Hohfeldian interpretation is that property; whether, as "quasi-property", or, my classification of intellectual property in Hohfeldian language, *offshore property*, confirms that property is a form of legal relationship with the state. Therefore when questions of legal relations *among* states through property or *offshore property*, are raised then, it is not a question of the domestic state law alone, but those concerns requires the inclusion of an analysis on customs relating to property and external norms.

In *Fundamental Legal Conceptions* (1913) Hohfeld never made a direct connection to *offshore intangible* (such as patents) forms of property. However, given that Hohfeld's broader prognosis of jural relations of property is wide enough to cover most legal obligations, it is not difficult, to transpose or analyse Hohfeld from the realm of intellectual property. Hohfeld's theory of legal interests as rights, including the concept of privilege,[60] strike a chord with the regimes of intellectual property.[61] But, on a broader account, discussing intellectual property in Hohfeldian language means acquiescence to jural relations of rights in privilege-right; power-right; claim-right and probably (immunity-right). This is because the intellectual property regime is made up of different *system-rights* (trademarks, copyrights, patents) and that regime is covered by *legislative-right* to property. In other words, an international treaty on intellectual property rights (or a domestic law) provides for Hohfeldian bundle of property rights, to enjoy via use, to own and to exclude. In this regard, the intellectual property regime provides for a Hohfeldian claim-right to property in a trademark for example; and to be able to exclude others (infringers) from use of the trademark; so that the privilege-right can be enjoyed; while, at the same time, the trademark owner can fulfil the power-right to acquire the property in trademarks through application or use.

[56] *INS v AP*, 236.
[57] *Ibid*, 250.
[58] *Ibid*.
[59] Eg, Richard Epstein, "International News Services v Associated Press: Custom and Law as Sources of Property Rights in News" (1992) 78 *Virginia Law Review* 85; Walter Cook, "The Associated Press Case" (1919) 28 *Yale Law Journal* 387; Shyram Balganesh, '"Hot News': The Enduring Myth of Property in News" (2011) 111 *Columbia Law Review* 419; Christopher Wadlow, "A Riddle Whose Answer is 'Tort': A Reassessment of *International News Services v Associated Press"* (2013) 76 *Modern Law Review* 649.
[60] At note 60 Hohfeld cited Copyright Act, 8 *Statue of Anne* (1709) c. 19 and appeared to have equated *liberty* to privilege.
[61] Eg, Oren Bracha, "Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property" (2007) 85 *Texas Law Review* 1799, 1806 (explaining that copyright law is the perfect example of a property right with Hohfeldian characteristics).

Hohfeld's work on the nature of rights from the perspective of property reveals that the state is central to questions relating to the rights in property. This is because, rights in property is a creature of the law – the domestic law of the state, whose powers include enforcement. In this regard, property rights is a form of legal relationship with the state and that relationship encompasses a series of *rights* that Hohfeld developed in *Fundamental Legal Conceptions*. For property rights to exist, the state must initiate legal rules relating to the protection of property. The protection of property in a state emanates from customs guaranteeing individuals to enter jural relations with the state so that individuals can claim rights to property. Because of this jural relations with the state, and private individuals, over the ownership and protection of property, states are obliged to exercise restraints in encroaching on private property. States are also required to protect the interests of private individuals in property from external forces through rules on the exclusivity of property, a point that the *INS v AP* Court reinforced.[62]

Another relevance of the Hohfeldian concept of rights is that, for the broader interactions of states (in relation to rights over property) in the intellectual property regime, the laws governing states interactions are increasingly yielding to the legal rights of property owners. What this means is that, the law of nations (public international law) increasingly become privatised, as it must be used effectively by the owners of rights in the intellectual property regime to lay claim and enforce those rights when they are transposed beyond the domestic state. Hence, where Hohfeldian rights, claims and duties exist, so too, are the rights to privatise the law of nations given the significance of rights and privilege, and their distinction (in the international economic system). The economic significance of that distinction, was a point Hohfeld would, in his 1917 follow-up article, briefly touched upon: "as a matter of great practical consequence and economic significance, the property owner's rights, or claims, should be sharply differentiated from his privileges."[63]This, to my mind, should be seen as part of the internal structure and dynamic of rights in relation to intellectual property, and the economic significance of intellectual property as sponsors of the privatisation of the law of nations.

The internal economic structure of rights in property have been important in how other organic legal rules in the law of nations emerged. Thus, the internal structure of rights, is, in part, based on Hohfeldian thinking, that the content of intellectual property rules emerged in the same fashion as other rights in the international legal system, and its initial struggle for recognition and subsequently the economic structure of the international legal order.[64] However, to further understand the economic system of rights and the intellectual property legal order, it is worth turning to notions of *justice*, *fairness*, and what I called *market libertarianism* based on the work of John Rawls.

2. Rawls: pluralism and intellectual property rights (a Hohfeldian analysis)

In the previous section it was established that Hohfeld developed an architecture of rights based on conceptions of property. Moreover, it was also established that the Hohfeldian concepts applies to what I refer to as *offshore properties* such as patents, copyrights or trademarks. Given that Hohfeld has influenced significantly legal thought, the key question becomes, can Hohfeld's concepts apply to liberal construction of rights or the space of many rights? If so, what is the connection to intellectual property rights. I explore in this section, or at least, try to argue that a connection between intellectual property and Rawlsian principles of *justice* and *fairness* exists. The section explores the argument by engaging with Rawls' *Political Liberalism* where he develops the principle of pluralism. But given

[62] *INS v AP*, 248 U.S. 215, 246 (Holmes, J., concurring).
[63] Hohfeld 1917 (n 30) 747.
[64] Eg, Volker Heins, "Human Rights, Intellectual Property, and Struggles for Recognition" (2008) 9 *Human Rights Review* 213.

that Rawls's major works are a trilogy: from the abstract (philosophical);[65] to the practical in a state;[66] and then finally to the international;[67] it is, for the purposes of this article, to harmonise Rawls' theories to develop a defence or linking Rawlsian theories to intellectual property.[68]

The starting premise is the understanding that the Rawlsian principle of *basic liberty* is applicable to intellectual property. This principle, as Rawls first developed in *Theory of Justice* argue that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."[69] This is generally referred to as *Rawlsian First Principle*, and it is this first principle, I relied on, as it has a more natural affinity to the *rights* language in Hohfeldian terms. Moreover, there is also a link to the broader international and intellectual property rights paradigm. For the purposes of this section I interpret Rawls first principle to include all members of a society: *economic producers* (rights owners) and *economic participants* (citizens). The second connection to intellectual property based on Rawlsian principles is *constitution-like rules* that are prevalent in a democratic and pluralistic society.[70] I will return to this latter point shortly.

Rawls, like Hohfeld, did not directly address intellectual property in his works, however, their views on property also directly relates to intellectual property. Rawls, for instance, in his major works, artificially addressed property with the underlying theme of distributive justice.[71] In this section, I will rely on *Political Liberalism* where Rawls develops, among many other things, a theory of pluralism as a form of justice (but not necessarily for the international economic system) to apply his views to intellectual property. This approach will also lay the foundation for the arguments on the justification of intellectual property (below).

At first, any discussion of Rawlsian principles of justice and intellectual property may seem at odds – opposite of reasoning and analytical discourse. For one, intellectual property rights are about exclusivity and monopoly rights, and Rawlsian principles of justice are about a *liberal* (social) and *fair* (economic) society: *fire and water don't mix*. However, this section of the article is arguing that that is not the case, and there is *systemic unity* in framing intellectual property in Rawlsian principles of justice; or at least, Rawls theory on pluralism, in order to defend the rights in intellectual property, and to link those rights to Hohfeldian concepts of rights in property. Thus, the central premise is that there is a *right to rights* in intellectual property.

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[65] Rawls (n 1).
[66] John Rawls, *Political Liberalism* (Columbia University Press, 1993).
[67] John Rawls, *The Law of Peoples: With "The Idea of Public Reason Revisited"* (HUP, 1999).
[68] Eg, Darryl Murphy, "Are Intellectual Property Rights Compatible with Rawlsian Principles of Justice?" (2012) 14 *Ethics of Information Technology* 109; David Resnik, "A Pluralistic Account of Intellectual Property" (2003) 46 *Journal of Business Ethics* 319. My reference to intellectual property here is also an indirect reference to private property and it must be borne in mind that the philosophical articulation of *rights* is in general, a broad reference to private property, see Richard Bellamy, *Liberalism and Pluralism* (Routledge, 1999) 59 (discussing property rights).
[69] John Rawls, *A Theory of Justice* (HUP, 1971) 60. However, in *Political Liberalism*, Rawls made slight alteration to the wordings of his "first principle": "each person has an equal right to fully adequate scheme of equal basic liberties which is compatible with a similar scheme of liberties for all," 291. The second Rawlsian *principle* states that: "social and economic inequalities are to satisfy two conditions. First, they must be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they must be to the greatest benefit of the least advantaged members of society," 291.
[70] Rawls (1993) 136.
[71] Rawls (1971); Rawls (1993). In *Political Liberalism*, Rawls's discussion on the basic structure of society, in a way, represents his views on property, however, given that property proper was not central to Rawls's discussion, but his allusion to personal property and democracy like property suggests that it was difficult to avoid that discussion, and therefore, rights on personal property is a basic liberty. See Benjamin Barros, "Property and Freedom" (2009) 4 *New York University Journal of Law and Liberty* 36, 58 – 59. I do believe that Rawls by design in discussing liberties and constitutional like democracy already assumed property to be part of the foundational system and therefore there was no need to go into great elaborations. Had Rawls been writing about non-constitutional democracies (eg a Soviet Utopian state) then he would have needed to address property proper.

A final point worth mentioning is that although my focus will be on Rawls political liberalism in general, this does not mean that I am excluding Rawlsian distributive justice and fairness. On the contrary, Rawlsian notions of distributive justice and fairness are also incorporated into the argument as they form part of the broader *Rawlsian* approach. However, to make the argument containable, a focus on political liberalism allows for examining pluralism in general and the way it can be connected to intellectual property rights in the international legal discourse. Moreover, *Political Liberalism*, is generally seen as an extension of Rawls earlier works that addressed the theoretical conceptions of justice and fairness initially set out in *Theory of Justice*, but, more specifically, it also addressed in more detail pluralism. Thus, when contrasting both works, arguable, in *Theory of Justice*, Rawls stressed on some form of moral justification for justice and fairness, but in *Political Liberalism*, he approached those same theories in a more realistic manner (albeit under the normative diagnosis of the political space). In other words, liberalism is better justified in a political sense as opposed to a philosophical sense.

One of Rawls claim is that justice and fairness is built on the foundation of a pluralistic framework supported by freestanding political liberalism.[72] The *politic*, like the *legal* space, dominates a multitude of views that are often in conflict; and only some form of peaceful coexistence can deescalate the conflict. Providing a practical analysis of that political space (*politic*) through pluralism therefore, is one methodological form of *conflict resolution*. Given that Rawls political space is a narrative on parallels with Western democracies (where property rights are engrained in democratic values) then the political space is a liberal one where *rights* are in abundance and supplements the operations of the political space (the state). Rights in this Rawlsian political space requires the existence of Hohfeldian jural relations because for Rawls, the liberal political space endorses the rule of law that are essential to maintaining social cohesion and also laws that protect (property) rights for the benefit of society where stability is preferred over instability. It is in light of this why, in *Political Liberalism*, Rawls modified, what he had already developed in *Theory of Justice*, to argue that: "measures are required to assure that the basic needs of all citizens can be met so that they can take part in political and social life."[73] So, liberalism for Rawls, as commentators, have pointed out, corresponds to the ideals of the good life in a liberal political order with a neutral state with the freedom to choose.[74]

If, in *Theory of Justice*, Rawls mission was to offer the proper elements on the moral foundations of justice and fairness as broad as possible, then, in *Political Liberalism*, the concept of justice was reduced to a more manageable form of the political space. Thus, while, Rawls advocated for a comprehensive pluralistic framework of justice in *Political Liberalism*, he was also wary, that, for the continued success of rights in society, regulations were necessary to guarantee the freedom of rights. This therefore equates to how the freedom of rights that socially mobile citizens enjoy in a liberal political space and the obligation of the political and administrative order in the political space to provide rules on the enjoyment of property to ensure that there is a *right to have rights*[75] in a just society with various social arrangements and economic value paradigms.

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[72] Rawls, in part, argues: "political liberalism supposes that there are many conflicting reasonable comprehensive doctrines […] This reasonable plurality of conflicting and incommensurable doctrines is seen as the characteristic work of practical reason over time under enduring free institutions", *Political Liberalism* (1993) 135.

[73] Rawls (1993) 166.

[74] Percy Lehning, "Liberalism and Capabilities: Theories of Justice and the Neutral State" (1990) 4 *Social Justice Research* 187.

[75] My reference to the rights to have rights is in a corporate context – that is the owners of intellectual property rights that are mostly corporate entities to which individual is only a part of; see Linda Tannehill and Morris Tannehill, *The Market for Liberty* (Lansing: Michigan, 1970); Ayn Rand, *Capitalism: The Unknown Ideal* (Signet Books, 1966) chapter 11: "Patents and copyrights are the legal implementation of the base of all property rights: a man's right to the product of his mind."

In essence the Rawlsian principle of pluralism essentially means that in a democratic society where economic goods flourishes all members of society can benefit. Given that Rawls excluded a proper discussion on property in his theories, then, it is how Rawls formulates the basic structure of society and pluralism that opens the gateway to argue that the connection of society's basic structure are inextricably linked to individuals in society to exercise or claim rights in property. In other words, Rawls, turn to the property and the rights that are associated with real property, or as he refers to it, "basic structure", to argue that beyond justice and fairness in the liberal political space, a regulatory framework is needed to guarantee those rights. Rawls argues that "although society may reasonably rely on a large element of pure procedural justice in determining distributive shares, a conception of justice must incorporate an ideal form for the basic structure."[76] This might be conceived as separating utopian (justice and fairness) from pragmatism (private law rules) in relation to the rights that, in a Rawlsian society, all members are free to enjoy primary goods. The members of a Rawlsian society are "reasonable persons" and part of that reasonableness enables them to accept some form of *reasonable pluralism* such as legislative rights in property protection or the legitimacy of justice.

Now, let us consider that in a Rawlsian society, for the sake of argument, there are only barbarians and no reasonable person. At the same time, in this hypothetical Rawlsian society, property is abundant, but no form of legislative rules exists to guarantee the rights in property. Would this mean that the barbarians would use custom to provide for the legitimate rights in the ownership of property? This scenario is likely, and the barbarians, in this hypothetical Rawlsian society are also like the reasonable man in the normal Rawlsian society. The Rawlsian reasonable man and his barbarian counterpart are economic actors bounded by a form of "social self-determination"[77] and common factors that mixes, political, social, authority, individual freedoms and Hohfeldian rights. Thus, what *Political Liberalism* does, is that it enunciates how formal rules can coexist with fairness and justice in a society that embraces various hierarchal norms – the pluralistic framework.

To better illustrate Rawlsian pluralistic framework in the context of intellectual property, snippets from the courts or tribunals is necessary. In various cases in domestic courts, higher courts, or international tribunals, some rulings have referred to Rawlsian theory: not as the overall reasoning for their rulings, but as part of the fundamental role of Rawlsian theory on the judicial sphere. For example, Rawlsian conception of justice and fairness, or at least, when interpreted as procedural and equal opportunity, has been invoked in WTO cases such as *EC – Sardines* (2002);[78] *US – Frozen Lamb*;[79] and *Canada – Civilian Aircraft*.[80] These instances of *fairness* in the WTO are to be seen from a *libertarian liberalism* perspective where the core concern is equal opportunity and procedural fairness. A further way of looking at these WTO instances of fairness is from the perspective that fairness as a concept is vague and broad and can also be incorporated within other principles such as good faith.[81] Outside of the WTO, early Rawlsian liberalism has also been invoked in *Repetti v Gill*[82] signalling how serious the courts took the Rawlsian principles in their early formation. However, it is at the international level that the significance of Rawlsian principles carries more weight. One can ponder whether Rawlsian principles of justice and fairness is applicable to the debates on international intellectual property rights – but the tribunals do not directly address those questions. But a more vital

[76] Rawls (1993) 281.
[77] Ross Zucker, "Whose Property is it Anyway? The Social Nature of Economic Actors and Egalitarian Remuneration" (1995) 7 *Review of Political Economy* 375, 383.
[78] *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, (2002) [140].
[79] *United States – Safegurad Measure on Imports of Fresh, Chilled or Frozen Lamb from New Zealand*, WT/DS177/AB/R; WT/DS178/AB/R (2001) [115].
[80] *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (1999) [190].
[81] Eg, Marion Panizzon, "Fairness, Promptness and Effectives: How the Openness of Good Faith Limits the Flexibility of the DSU" (2008) 77 *Nordic Journal of International Law* 275; Thomas Frank, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995).
[82] *Repetti v Gill*, 372 NYS 2d 840, 848 (1975).

question is whether Rawlsian principles justify the legitimacy or determines *property rights* in the international intellectual property regime?

That was a scenario that the WTO had to deal with in the *Plain Packaging* disputes, whether the owners (investors) of trademarks had a legitimate interest in their investments (property).[83]Thus, the issue of legitimacy is tied to many factors. In fact, one of Rawls' core concern relates to legitimacy in the pluralistic political framework that he advocates.[84] For Rawls, in a pluralistic society where people are reasonable, rules are able to justify the legitimacy of the political framework providing that such rules are publicly accepted (the participation of all members of society).[85] Yet, despite this prognosis, objections to intellectual property in the international legal regime is robust; and often, lack crucial insights into the content of the law relating to intellectual property or, the right to have rights in international intellectual property, when seen from Hohfeldian or Rawlsian perspectives. From Rawlsian *pluralistic liberalism*, the connection between international intellectual property and the rules of the international legal regime represents progress in democratic society and idealism that every participant in society can operate, participate and make economic contributions based on the *constitutive elements of rules* that are in the international legal regime. That is what I meant by constitution-like rules as alluded to.

The various developments in international law over the past century represents a legal pluralistic order where different and competing participants in society can lay a claim of *rights-rule* that advances their economic interests and contributions to society. The result of such claims to rights-rule are what Rawls envisage in the first place: *fairness*, *justice* and *legitimation* of the international political order that helps to create the rules in the first place. In this regard, a fair account of rules in the international intellectual property order will take into consideration the pluralistic nature of Rawlsian fairness and justice and a Hohfeldian rights-claims system and the various legitimising acts of international law. Seen from this perspective, then justice and fairness, is not only for the benefits of "unequal peoples" in society but also extends to the significant economic participants that are the owners of property (including intellectual property) who have a claim to rights – the right to have rights in international intellectual property. It is in this spirit that Rawlsian political liberalism embraces the nature of a free market society where rules enacted by the political authority either at the international level and state level are justifiable. As such, Rawlsian liberalism represents "an outcome of the application of the liberal principle of legitimacy and the notion of public reason it expresses, given the fact of reasonable pluralism."[86] Thus, the existence of rules in a society also enables the participants in that society to be rational human beings.

Moreover, it should always be considered that questions on the *internationalness* of intellectual property reflects the very pluralistic framework Rawls developed given that the world is a multitude of economic participants, where the basic structure involves a form of Hohfeldian *right-claim* in property.[87] In this regard, the existence of an international system of enforceable intellectual property rules with rights-claims captures rights to property in a domestic context and the implication of

[83] *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS/435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R, 28 June 2018 [7.1925] [7.2429].
[84] Rawls (1993) 137.
[85] Enzo Rossi, "Legitimacy, Democracy and Public Justification: Rawls's Political Liberalism versus Gaus' Justificatory Liberalism" (2014) 20 *Res Publica* 9, 12.
[86] Berys Gaut, "Rawls and the Claims of Liberal Legitimacy" (1995) 24 *Philosophical Papers* 1, 5.
[87] Eg, David Douglas, "Towards a Just and Fair Internet: Applying Rawls' Principles of Justice to Internet Regulation" (2015) 17 *Ethics and Informational Technology* 57; Kurt Burch, "Intellectual Property Rights and the Culture of Global Liberalism" (1995) 17 *Science Communication* 214; Martha Nussbaum, "Political Liberalism and Global Justice" (2015) 11 *Journal of Global Ethics* 68 (transposing Rawlsian political liberalism beyond the nation state).

property rights beyond the domestic state.[88] In this way, then, *Political Liberalism* endorses and harmonises, what are also pronounced in international human rights instruments, such as the United Nations Declaration on Human Rights (UNDHR), including the rights to private property and the right to liberty.

Given that almost all of the crucial elements of the Rawlsian egalitarian navigator has been technically discussed, Rawlsian approach to intellectual property still remains semi-chartered territory. Yet, that is not a result of lack of attempts, but rather, because of the difficulties in framing Rawlsian approach to intellectual property against the rights regime in the international legal plane. To better understand Rawls in the intellectual property regime requires that one should be able to diagnose Rawls views on property, as part of the greater political liberal system where rules exists, citizens enjoy freedoms, and a *right* to (personal) property.[89] From this perspective, the Rawlsian approach to intellectual property entails not only distributive justice, fairness and pluralism, but also encompass Hohfeldian concepts of rights (including Lockean). Moreover, Rawlsian approach to intellectual property, as I framed it, converges with how economic participants (individuals) in a liberal society rely on rules that ensure fair distribution applies to the right to engage in economic production (rights owners). It is for that reason why the shift in international intellectual property occurred in the TRIPS regime (as opposed to the pre-TRIPS era) and provided for a "new-egalitarian-Rawlsian –international instrument,"[90] even though the TRIPs era of international intellectual property law had been subject to much criticism that failed to take into account – the c*ontent* and *context* of rules that guarantee the *right to have rights* in intellectual property. In other words, modern international law has expanded to cover a pluralistic system of rights that includes the rights of (*intellectual*) property.

The pluralistic framework that Rawls paints suggests a fundamental structure where rights and obligations are essential to the market for goods that enables economic producers to be creative, productive and socially progressive. That market is competitive and full of various economic producers and economic participants where the ownership of property represents "reasonable plurality of conflicting and incommensurable doctrines"[91] and as such, for Rawls, regulatory measures guarantees justice, fairness, rights. This is regardless of the goods in the market as regulations and rights allows for a fair pursuit of economic participation. Thus, in a Rawlsian sense, the rights in intellectual property represents global social progress that began when John Speyer obtained the earliest known patent in 1469 that allowed him to enjoy "exclusive printing privileges in Venetian territory, and forbade the importation of competing books of foreign imprint"[92] to the legitimate rights of trademark owners in the plain packaging of cigarettes nowadays.[93] Thus, with the expansion and progress of intellectual property in contemporary times, the fundamental question is whether intellectual property is justified, and if so, what are the theories for the justification of modern intellectual property, and how do the theories measure up against the liberalism of Locke and Rawls, or the Hohfeldian concepts of rights-claim. The next section address some of these questions, primarily looking at Robert Merges' book that emerges from the Rawlsian debate on the pluralistic framework of liberalism.

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[88] Eg, P. Sean Morris, "Beyond Trade: Global Digital Exhaustion in International Economic Regulation" (2013) 36 *Campbell Law Review* 107.
[89] Rawls (1993) 298 discussing personal property.
[90] Shlomit Yanisky-Ravid, "The Hidden Though Flourishing Justification of Intellectual Property Laws: Distributive Justice, National versus International Approaches" (2017) 21 *Lewis and Clark Law Review* 1, 30.
[91] Rawls (n 72); Robert Cooter, "Freedom, Creativity, and Intellectual Property" (2013) 8 *New York University Journal of law and Liberty* 1 (arguing that economic freedoms should be legalize through intellectual property law).
[92] Bruce Bugbee, *Genesis of American Patent and Copyright Law* (Washington DC, 1967) 21, as cited in, Adam Moore, "Intellectual Property: Theory, Privilege, and Pragmatism" (2003) 16 *Canadian Journal of Law and Jurisprudence* 191; see also, David Resnik, "Fair Drug Prices and the Patent System" (2004) 12 *Health Care Analysis* 91 (using Rawls to defend fairness in the international patent system under the TRIPS).
[93] See (n 83).

3. Justifying private rights in intellectual property: Merges, pluralism and proportionality

How could a rural Indiana farmer who planted genetically modified seeds be the subject of a litigation by a giant corporation for infringing intellectual property rights? And more importantly, are there any rights in seeds (genetically modified or other) that belongs solely to an individual (or corporation) when seeds are technically, abundant in nature, or even if genetically modified seeds are a self-reproducing product? As it stands, the answer to these questions (legal and biological) can be found in how the intellectual property regime allocate rights for invention, innovation and discoveries under the patent system. Thus, in *Bowman v Monsanto*[94] the US Supreme Court was faced with whether the patents of Monsanto were infringed when Bowman harvested patented soybeans from an initial planting and then reused seeds from the original planting. The Court held that the Indiana farmer infringed the patent rights of Monsanto as the patent exhaustion doctrine did not allow the farmer to replant the seeds.[95]

The illustration of the *Bowman v Monsanto* case reflects the broader intellectual property regime where private rights in intellectual property are concerned and how *the* law – private law, to which the intellectual property rules are a part – justify the right to have rights. There are two broad questions that are important for the purposes of this section – are intellectual property rights justifiable, and secondly, to inquire, rather briefly, if "justice and efficiency"[96] in intellectual property are tools that allows for private rights to legitimise (public) international law for the legitimate interests of intellectual property owners. However, this part of the article is concerned mostly in answering the first question, although, the second, will be addressed in part, at the end of this section. But to address the first question, it is necessary to put in context its relationship with Hohfeldian concepts of rights and Rawlsian liberalism in intellectual property as I sketched out in the sections above.

A significant part of the analysis (and the answer) however lies in the book – *Justifying Intellectual Property* by Robert Merges – that gives a modern interpretation (twenty-first century) on the justification and ethical foundations of intellectual property rights both in the Rawlsian sense of distributive justice/liberalism and also, prior liberal philosophical theories of property rights.[97] Building on various themes Merges' work has shone the *light of justice* on intellectual property and provides strong theoretical commentary on private rights in intellectual property. The book is an interwoven collage of the philosophic traditions of Kant (individual freedoms), Locke (justification for appropriation), and Rawls (distributive justice and liberalism) as the bedrock that support property rights norms in intellectual property.[98] Yet, it is a book where one of the leading disciples of modern law and economics methodological studies of private law (to include intellectual property) rejects utilitarianism in search for an alternate discourse to justify intellectual property and heard his calling, through the philosophical and ethical discourse of pluralism. Merges is generally a strong advocate of a utilitarian approach (the economic maximisation of intellectual property for societal benefit) to

[94] *Bowman v Monsanto Co*., 133 S. Ct. 1761 (2013).

[95] *Ibid*. The Supreme Court argued that the exhaustion doctrine applied only to "particular item sold" and as such, the patentee still has a right "to prevent a buyer from making new copies of the patented item,"1766 – 1767; see also, Jessica Lai, "The Exhaustion Doctrine and Genetic Use Restriction Technologies: A Look at Bowman v Monsanto" (2014) 17 *Journal of World Intellectual Property* 129.

[96] See, Richard Posner, *The Economics of Justice* (HUP, 1981) discussing justice and efficiency in general; Nicholas Luhman, *A Sociological Theory of Law* (Routledge, 1985).

[97] Merges (n 20). Prior debates also include but not limited to, Horacio Spector, "An Outline of a Theory Justifying Intellectual and Industrial Property Rights" (1989) 8 *European Intellectual Property Review* 270; William Dibble, "Justifying Intellectual Property" (1994) *UCL Jurisprudence Review* 74.

[98] The book has received good feedback among the critics, eg, Justine Pila, "Pluralism, Principles and Proportionality in Intellectual Property" (2014) 34 *Oxford Journal of Legal Studies* 181; Gordon Hull, "Robert Merges: Justifying Intellectual Property" (2012) 14 *Ethics and Informational Technology* 169; Ikechi Mgbeoji, "Book Review: Justifying Intellectual Property, by Robert P. Merges" (2012) 50 *Osgoode Hall Law Journal* 291.

intellectual property as evidence by his law and economics methodology in other works.[99] But, in this book, Merges rejects the utilitarian justification of intellectual property partly because of its complexity and failure to demonstrate with solid empirical evidence that can reasonably justify intellectual property. Merges argue that the justification of intellectual property is better explained by the strong philosophical and liberal traditions through Locke, Kant and Rawls, and develops his own theory through a liberal theory (pluralism) that better justifies the intellectual property regime.

The thrust of Merges' book is to advance a set of theories, in which, intellectual property operates freely, without being underpinned by any singular foundation. In this vein, Merges argues that a number of mid-level principles, namely: efficiency, non-removal (from the public domain), dignity and proportionality are the pluralistic framework that justifies intellectual property and not the common straight-faced utilitarianism justification all too familiar (especially in Anglo-American theories). Of the four principles that Merges' advocates he place great emphasis on proportionality – as the core foundational principle with legal and practical relevance for intellectual property.

I will shortly return to Merges' treatment of pluralism.

Merges' liberal theory is drawn from the principal elements of Rawls's own form of liberalism (1971 and 1991) but, at the same time, appears to have close connection to those of Resnik who developed similar theories, based in part on Rawlsian principles.[100] For Merges, intellectual property are basic rights "even if IP protection leads to some distributional unfairness, society should still include it among the basic rights to which all are entitled."[101] In this context, Merges' adoption of a fairness approach to intellectual property is inextricably link to rights – no matter how those rights are claimed: whether in intellectual property, real property, or the *constitutional- like* nature of rights at the international level. Seen differently, rights, or claims to rights, are of a higher omnipotent structure, so much so, that its very foundation is built upon a liberal spread of eligible claims to rights. For this reason, Merges has no other option but to assign intellectual property rights to that omnipotent and all-encompassing structure, though basic at its foundation, it is liberal because "creative labor is valuable and important."[102] This strong advocacy of intellectual property rights, through a legalisation process of the state (property rights), allow Merges to trace through the historical and philosophical pages of Kant, Locke and Rawlsian liberal theory to justify intellectual property rights from a pluralistic perspective.[103]

It is not unnatural for a firm believer in God to reject his teachings and embraces the *plurality* of atheism. In some ways, this is exactly what Merges (an apparent avid Christian) did when he rejected utilitarianism for pluralism in his book. Of the four mid-level principles that Merges' developed, he devoted an entire chapter to proportionality. So, what does this tells us? Has intellectual property suddenly found a new faith, and all the other foundations, especially that steeped in utilitarianism was wrong? Not really. But alternatives exist.

In addressing pluralism, Merges argues that "strong IP protection encourages and facilitates a wide variety of approaches – *including various degrees of openness* – without mandating or coercing any single approach."[104] Intellectual property is a collection of various regimes (copyrights, patents, trademarks, etc.) and is open up to new regimes as they interact with the traditional areas of intellectual property. At the same time, the rights, scope and obligations under the various regimes of intellectual property continues to expand and are also redefined by the courts as they determine how

[99] Eg, Robert Merges, "Intellectual Property Rights and the New Institutional Economics" (2000) 53 *Vanderbilt Law Review* 1857.
[100] Resnik (n 68); Resnik (n 92); Pila (n 98) 188.
[101] Merges (n 20) 112.
[102] *Ibid*, 293 (explaining the relevance of IP rights).
[103] *Ibid*, 110.
[104] *Ibid*, 238.

those rights, scope and obligations correspond to domestic laws on intellectual property and the policy objectives of those intellectual property laws. From this perspective, Merges is correct to view the intellectual property regime as open and rich with diversity. But where does this endorsement of strong intellectual property protection converge with proportionality as developed by Merges? First, let us look at how Merges define proportionality.[105] In fact, for Merges, there is *no* definition of proportionality,[106] (proportionality, however, for Merges "is a transcendent principle that ties together all manner of disparate situations"[107]). Rather, Merges identifies proportionality as an under-theorised mid-level principle that partly entails intellectual property rights that are fair and reward owners and inventors returns based on the market. In other words, proportionality, in Merges world, preaches a degree of efficiency and fairness based on the market "where the idea of rewards proportioned to effort or value."[108] Merges, the disciple that rejected utilitarianism in intellectual property, has found his way – a born again, and embraces "the utilitarianism of efficiency". Well, at least, that is how it seems in Merges' discussion on proportionality. Yet, it is not quite so. Merges suggest that under the proportionality principle, the government (and the courts) have a *right* to intervene in the transactions of intellectual property to correct undue leverage or "radical imbalances that may emerge."[109] The courts he argue may modify "the entitlement structure of already-issued IP rights"[110] and the government can make "postgrant rights adjustments"[111] that correlates with fairness in property rights as originally developed in Lockean, Kantian and Rawlsian fashion. One understanding of Merges' proportionality discussion is that he advocates both for legal and social approaches to intellectual property where the *systems like* nature of intellectual property is different. Naturally, this interpretation is reminiscent of *systems theory* that made its way into legal analysis in recent years[112] and perhaps, Merges had in mind systems theory when he diplomatically opposed the impossibility of defending "a legal system that permits grossly distorted transactions."[113] Nevertheless, what is however significant from Merges' theorising of proportionality is that important questions in relation to proportionality in international intellectual property instruments are unavoidable,[114] and it is those questions that makes Merges' work an important dialogue in the international ideology of intellectual property rights.

One of the significance of Merges' work is that it provides a useful theoretical channel for which analytical debate on intellectual property can be conducted. Moreover, for my own purposes, there is even little to disagree with Merges' on (except perhaps he sometimes contradicts his own reasoning)[115] given that we both share the same objective – the defence of intellectual property from the unfair treatment it has received. For Merges' that defence is from the ethical and philosophical traditions of property rights and the variety or pluralistic space that can justify intellectual property.

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[105] *Ibid*, chapter 6; 159 – 191, 181 (setting out one definition of proportionality).

[106] In the introduction, Merges, however, gives what is essentially a clear definition of proportionality, when compared to his discussion of proportionality in chapter six, where there is no definition, but rather a series of instances that encompass proportionality, Merges, *ibid*, 8.

[107] *Ibid*, 162.

[108] Mgbeoji (n 98) 294.

[109] Merges (n 20) 184, and 181. Merges uses a number of examples such as leveraging and rent-seeking, including the cases such as *eBay* to illustrate his point, see also *eBay Inc v MercExchange*, L.L.C., 547 U.S. 388 (2006).

[110] Merges, *Justifying Intellectual Property*, 181.

[111] *Ibid*, 184.

[112] Eg, Luhman (n 96); Ana Lourenco, "Autopoietic Social Systems Theory: The Co-Evolution of Law and the Economy" (2010) 35 *Australian Journal of Legal Philosophy* 35.

[113] Merges (n 20) 190.

[114] Eg, Max Wallot, "The Proportionality Principle in the TRIPS Agreement", in Hanns Ullrich, Reto Hilty Matthias Lamping and Josef Drexl (eds), *TRIPS Plus 20: From Trade Rules to Market Principles* (Springer, 2015).

[115] In some ways Merges rejects utilitarianism and in other ways he embraces efficiency. I see this as contradictory given that part of the rhetoric of utilitarianism include the efficiency argument. Merges in general has so far had to answer a number of critics, and in what is essentially a post-script, he addressed some early critics, see Robert Merges, "The Relationship Between Foundations and Principles in IP Law" (2012) 49 *San Diego Law Review* 957.

In other words, intellectual property can be justified on many grounds. For my own purposes, that defence is through the system of international law which serves the legitimate interests of intellectual property rights holders in contemporary society; and which, incidentally, reflects the more than six hundred years history of intellectual property (mostly copyright and patents). Merges' work may not have fully convinced all the critics[116] however, there is room to engage with Merges' thoughts to unravel the complexity of *rights* in intellectual property in the international system. This is further supported by the fact that part of Merges' deliberations were based in part on the work of Rawlsian distributive justice and liberalism and the societal benefits that are still available even if such property rights at the international level are exclusive. Merges' for instance, argues that intellectual property should not be seen only as social utility but also fundamental rights that are to be taken seriously as ownership in intellectual property "represents a societal reward for effort and creative work"[117] and "permits people to show that they are deserving in the first place."[118] My own attempt to transpose the triad of liberal intellectuals (Locke, Hohfeld and Rawls) on the international intellectual property system, is not the same approach as Merges' for domestic intellectual property through a philosophical discourse. Rather, I interpret Merges and the forbearers of property liberalism to include the scope of international law. Moreover, unlike Merges whose discussion is mostly about copyrights and patents – I sometimes invoke the modern intellectual property regime of trademark law and policy to extrapolate its liberal agenda and its defence of the legitimate interests of rights (trademarks as investments as seen in the plain packaging cases at the WTO). By turning to trademark law and policy in the international legal system affords intellectual property to be seen not only under the historic elements of patents and copyrights but how the legitimate interests in trademarks reflects the pluralistic structure that Merges advocates due to the "multidimensional"[119] nature of trademark law.[120]

Merges theory of pluralism is one of his key argument. It is also a theory that I find support for given that the modern market for intellectual property at the international level contain more players (rights owners) than the domestic market for intellectual property.[121] Merges does not dismiss the classic libertarian argument for rights such as Locke and Rawls – rather he embraces them and argue that there is still more space for other players in a *democratic* marketplace that is based on property rights. Merges suggest that this marketplace can accommodate new entrants as part of the pluralistic system of rights that justifies intellectual property. Merges' arguments are conducive to the ideological nature of international intellectual property because rights in intellectual property have now shift from the singular domain of the nation state to the global level where there are multiple players in intellectual property.

The regime of international intellectual property allows for the advancement of interests and rules to protect those interests at the international level, and thereby, creating a *cosmic* domain of rules and rights. In this cosmic domain, the various regimes of intellectual property are brought together through harmonising treaties such as the TRIPs Agreement and institutions such as the WIPO. Seen from a pluralistic perspective, international rules in intellectual property (TRIPS Agreement) and institutions such as the WIPO promotes similar agendas, however, what differentiates them is the need to support and promote pluralism in the intellectual property space and the various ideological agendas that forms part of that pluralistic space. Thus, rules and ideologies can blend to create

[116] Pila (n 98); Mark Lemley, "Faith-Based Intellectual Property" (2015) 62 *UCLA Law Review* 1328.
[117] Merges (n 20) 106.
[118] *Ibid*, 125.
[119] *Ibid*, 215.
[120] See Morris (n 7).
[121] See eg, Lee Branstetter, Raymond Fisman and C. Fritz Foly, "Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical Evidence from U.S. Firm-Level Panel Data", (2006) 121 *Quarterly Journal of Economics* 321;

harmonisation in what would otherwise be a chaotic system. Therefore, Merges theory on pluralism supports a democratic market space that promote various *rights* thereby justifying other rights in that market space.

An essential advancement of the pluralism theory is that harmonising rules and various actors can innovate and produce new goods that supports society in general but fall back on the foundational core of a democratic society – rights in property. Rights in property within a pluralistic marketspace provides for the owners of intellectual property to innovate and develop a fairer and diverse society with spill over benefits for other societies so that harmonisation can take place through new rights paradigms. Merges' theory of intellectual pluralism reflects this new rights paradigm with both normative and justificatory arguments in intellectual property. Furthermore, Merges' theory can also be a response to the developments in the international economic system – where similar ideologies of rights are based on the domestic notion of rights in property. As such, the international intellectual property regime has a rights foundations that is synonymous to rights in real property at the domestic level and offers fertile ground to promote pluralism in international intellectual property.

D. Between sovereignty and consensus: the role of "rights" in international intellectual property

In this section I will synthesise the argument that rights in the international intellectual property system reinforces the complex trajectories and competing interests of states and rights owners. I frame the argument under three sub-sections: (1) ideology of rights from the perspective of international intellectual property; (2) proportionality in the context of Merges justification theory and (3) intellectual property rights as a *leverage consensus point* due to the competing interests of intellectual property that the TRIPS recognise.

The discussions in these sub-sections of the article are not based on technical legal argumentation, rather, they are based on the context of the philosophical traditions of rights in property as set out in the previous sections of the article. What we have seen so far in this article is that, the traditional, and modern justification of (intellectual) property rights, are based on pluralistic liberal accounts of the market, and the societal elements where *rights* are respected and grounded in law. This all-inclusive domain of rights shapes the way the economies of nation states evolve. From this point of view, the all-inclusive domain of rights contains characteristics and structural elements that are welcoming to *other* forms of rights that builds upon the basic elements of democratic liberalism and market pluralism. New forms of rights such as intellectual property that enters the all-inclusive domain of *rights* function alongside the basic elements, but, at the same time, advance their own interests and visions, of market participation, to the extent, that the state allows via regulatory means the exclusivity to own/protect intellectual property. Hence – state powers to legislate in intellectual property and democratic rules of market participation allow rights owners to develop norms and ideologies that are appropriate for their own individual agendas and interests in the market. Under these circumstances the territorial coverage of the market is not relevant – as, it can be domestic, or beyond the state borders (international). Therefore, if the market for intellectual property goods is a domestic one – rights owners participate at the *will* of that market with assurances from the state on the protection of their goods and ownership in such goods. However, the participation of the rights owners beyond the borders of the nation state (at the international level) requires some form of uniformity to engage in the global market where multiple players participate in the market.

In the modern context – the uniformity is in the form of international institutions such as the TRIPS Agreement under the WTO. At this level, legal assurances are given that, like the domestic market, the owners of intellectual property goods are protected and supported by a central authority in which rights owners can advance their agendas under common rules. The market for intellectual property goods at the international level is also all-inclusive based on democratic inclusion and foundations of

property rights without discrimination. But participation at the international level also requires market participants to be fair and proportionate in how they leverage their individual agendas and interests in intellectual property. In this regard, standard arguments of rights (firmly entrenched at the domestic level) spill over to the international level as part of the ideological foundations of international intellectual property.

1. The ideology of rights in international intellectual property

In this first part of the section I want to bring together the views explored in the previous sections (Lockean, Hohfeld and Rawls) to understand the nature of rights in international intellectual property. But the discussion here is not a rehash of those views, rather the Lockean, Hohfeldian, Rawlsian and Mergesian justification views, for which, I am labelling the *new* libertarian rights – primarily from the perspective of corporate ownership of intellectual property – to argue or support the right to have rights in intellectual property.[122]

This ideological defence of intellectual property rights that I am arguing for in this section is relevant in order to later examine the international rules and intellectual property. In other words, does international intellectual property rules recognise rights in intellectual property within some form of reasonable interest or legitimate interest? That question is later addressed in this section of the article – but for now – the situation of *rights* in international intellectual property stems from how rights in the local context are seen. Rights theories in a domestic context is based on rights from a property perspective generates domestic innovation and economic growth that benefits society. As seen above, these rights are often part of a free market system that is *democratic* (and guarantee social and property rights). As demonstrated earlier, intellectual property rights are *rights* that individuals are entitled to when seen within the broader *rights* arguments,[123] but also, *rights* in intellectual property are owned by corporate entities that are better able to navigate the power of the state and its regulation of domestic intellectual property and international legal relations for intellectual property. Thus, rights, as part of the free market ideology – the new libertarianism of global intellectual property – are essential to the modern world of global commerce. Off course, when the idea of rights in intellectual property are raised in any discussion, the things that sprung to mind for most people relates to rights to medicines that are covered by patents, or, the rights to technology necessary for development. What is often ignored in this debate are the rights of the intellectual property owner to earn the reward of their intellectual labour as per the theories of Locke, Rawls and Merges. This is important because those private rights were not as a result of a public *common* endeavour, but, rather of "a man's right to the product of his mind."[124] In this scenario, the owner asserts his private rights that are guaranteed through the power of the state in the form of patents, copyrights or trademarks.

The discussions above (Lockean, Rawlsian and Mergesian) shows a continuity on the various ideologies of rights in free market societies; and that rights in intellectual property are justified as part of the system of private law that governs property. An important observation about that sequence of discussions, or at least, my analysis of them, is that no form of dissent emerged. Rather, one ideology of rights builds upon the other, to demonstrate that private rights are grounded in the economic fabric of society. As a result of this continuity – private rights guarantee fairness to both economic producers (rights holders) and economic participants (individuals). That fairness in private rights, the continuity of liberal thoughts on rights in private property and as a result, the justification of intellectual property, all contributes to the new libertarianism of global intellectual property. It is because of the ideas of private rights that "the law establishes the property of a mind"[125] that enable a nation to implement

[122] See Rand (n 75) on rights in intellectual property.
[123] *Ibid.*
[124] *Ibid.*
[125] *Ibid.*

"the optimal level of intellectual property rights."[126] In this context, modern intellectual property rules simply responds to the different forms of rights in trademark, copyright and patent regimes as part of the ideological tradition on the continuity of private rights.[127] What the new libertarianism reflects is that intellectual property are not treated exclusively in economic terms, but rather, a philosophical justification of the social value on the market for liberty in goods and ideas. The new libertarianism of intellectual property does not totally reject economic efficiency or the utilitarian justification of intellectual property, but, as part of the continuity argument, embraces the transactional role that private rights play in the social relations of society. In other words, as part of the social relations of intellectual property the liberal ecology of modern property rights allows for other ideological defences to be embraced.[128] This is because the creation of private rights in intellectual property brings societal benefits for economic participants and economic producers and defending these private rights from a singular ideology would mean the exclusion of reasonable and legitimate interests in intellectual property.

The right to private property for economic producers (rights owners) enables economic participants (individuals) to aspire and engage in the states' own ideological goals, and in the modern context, the ideological goals of states are increasingly full participation in trade and commerce.

Modern global trade is multidimensional as various legal relations are created by states among states, and by states among private enterprises (individualism). Asserting private rights in this (global) pluralistic legal arena requires the invocation of two sets of rights (or claims) to private property. The first assertion is the right to the intellectual creation as guarantee under the states' domestic jurisdiction (patent law for example). The second assertion of private rights requires the international recognition of domestic private rights in intellectual creations through rules that all nation states in the global market place for intellectual creations recognises (example the TRIPS Agreement). Under these circumstances, the primary actors are not the states nor the economic participants (rights owners), rather, the main actor is *private rights in property* as it traverses the domestic to the international. States and rights owners role are only to be invoked in this global pluralistic legal arena when those rights are breached. Therefore, if private rights in property are seen as the main actor, then, the justification of such private rights in (intellectual) property ought to take into account the benefits for owning this right, separately from any consequences of breaches of this right. Because this right exists in a multidimensional space of several players, that right is further justified through the ideological arguments on the continuity of private rights (Lockean, Rawls, and Merges) as part of a broader new libertarian agenda of international rules.

Therefore, as Merges argued, the justification of intellectual property rights should be open to other ideologies. Merges' arguments for the justification of intellectual property rights are not that different from Locke or Rawls – he simply refined those ideological traditions to form a continuous pattern that fits contemporary society where intellectual property have expanded to cover various subjects and objects. Part of that ideological continuity is being reflected in the TRIPS Agreement in that it embraces the new libertarian of rights for intellectual property owners to assert their private rights

[126] See, Shubha Ghosh, "The Idea of International Intellectual Property", in Matthew David and Debora Halbert (eds), *The SAGE Handbook of Intellectual Property* (Sage, 2015) 52, 55; Donald Richards, "The Ideology of Intellectual Property Rights in the International Economy" (2002) 60 *Review of Social Economy* 521.

[127] Eg, Andreas Rahmatian, *Copyright and Creativity: The Making of Property Rights in Creative Works* (Edward Elgar, 2011); Adam Mossoff, "Rethinking the Development of Patents: An Intellectual History, 1550 – 1800" (2001) 52 *Hastings Law Journal* 1255; Susan Sell and Christopher May, "Moments in Law: Contestation and Settlement in the History of Intellectual Property" (2001) 8 *Review of International Political Economy* 467; Alpana Roy, "Intellectual Property Rights: A Western Tale" (2008) 16 *Asia Pacific Law Review* 219, 239 (noting in particular the proprietarian creed of the global intellectual property rights).

[128] Eg, Richard Epstein, "The Utilitarian Foundations of Natural Law" (1989) 12 *Harvard Journal of Law and Public Policy* 711.

beyond the borders of their nation states. What the international rules to private rights in intellectual property represents is a set of complex contents on the ideology on property relations; a system of rights-claim *provisio*; the obligation of states to respond to breaches of private enterprises (individualism) rights, and the role of private property in contemporary freedom of rights and (global) market freedoms. Because intellectual property in the contemporary world are no longer limited to a single state – the assertion of private rights beyond state boundaries relies on the complex contents of property relations in the international system. One notable element in this complex content of property relations is a free market that essentially acts as a unifying element of the various complex property relations.[129]

In one area where the ideology of private rights in intellectual property is perhaps – an under-theorised field – is the tobacco industry. The theories and practicalities of intellectual property in the tobacco industry is even more complicated by the fact that only the trademark regime is applicable – in that only trademarks are used for the identification of various brands of cigarettes. Another factor that complicates matter in the tobacco industry and the property rights ideology is, also, the fact that, trademarks are not sufficiently addressed in the literature the same way as copyrights and patents from the perspective of property rights regime. Moreover, in the context of the justification of intellectual property rights, trademarks are difficult to justify in the same fashion as patents or copyrights from the innovation and competitiveness paradigm. The justification of trademarks is actually a more recent phenomenon – to signal quality and convey information, to "promote the expansion of economic activity beyond national borders."[130] For the new global economy – trademarks more concrete function is to serve the ideals of a market liberalism – investments. Thus, these are the underlying ideologies and justification of trademarks and the rules that support the *property* function in modern trademarks.[131]

The tobacco industry represents the convergence of the ideology of intellectual property in the sense that rights in trademarks are asserted over the commodification of product property where legitimate investments are made in property (tobacco) that brings societal benefits (economic). From the private rights perspective, intellectual property now represents a modification of the legal norms that are in private and public law. That modification starts to emerge even more when states interact beyond their national borders over the rights in private property that are represented by the domestic trademark regime in intellectual property. This new territory in which the ideology of private rights in intellectual property finds itself is further underlined by the fact that those private rights are asserted by private economic enterprises (individualism in rights). This new ideology involves the libertarian agenda of rights in property (Lockean, Rawlsian, Mergesian) that are backed up by Hohfeldian rights-claims guaranteed by domestic state power (intellectual property laws) and external state legal relations (international intellectual property laws). It is this new territory in the ideology of private rights in intellectual property that also echoes the argument that property and sovereignty are an intricate mix of private rights relations within contemporary international law. Writing in 1927, Morris Cohen, outlined the relationship that private property rights creates in relation to power: *dominium* versus *imperium*.[132] In other words, the private rights in property functions in a master and commander way by giving power over things (dominium) and power over other people (imperium). From this, it is evident, that private property rights have changed: and it is still doing so; changing the face of public international law.[133]

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[129] John Gray, *Liberalism* (Minnesota University Press, 1995) 61 discussing the noncoercive function of a free market.
[130] Memorandum on the Creation of EEC Trademark, *Bulletin of the European Communities*, SEC(76)2462, 6 July 1976, 21.
[131] *San Francisco Arts & Athletics, Inc v United States Olympic Committee*, 483 U.S. 522 (1987) recognising trademarks as private property rights.
[132] Morris Cohen, "Property and Sovereignty" (1927) 13 *Cornell Law Review* 8.
[133] *China – Intellectual Property Rights* (n 2) [7.500] discussing public international law.

2. Proportionality in international intellectual property law

A few sections above we were introduced to the principle of proportionality as part of the complex systems of Mergesian justification for intellectual property rights. For Merges, the proportionality principle, is one of the most under theorised of the four mid-level principles and he argues that "an IP right ought to be proportional to the contribution of a creative work", and therefore, "central to IP law."[134]

Merges writes:

> Proportionality shows up in all sorts of IP rules, from infringement and remedies in copyright, to the requirements of patentability, to various trademark doctrines. It shows itself most clearly when a creator claims a right whose value is grossly disproportionate to the actual contribution at issue. In this situation, *IP law finds a way to prevent the awarding of a disproportionate right* (my emphasis).[135]

He later notes:

> [O]n the proportionality principle in IP law, I offer a general principle that pulls together a large number of distribution-oriented rules scattered throughout IP law. […] I describe the idea of proportional reward as one of the essential conceptual building blocks of IP law. *Proportionality carries an inherent distributional element: each creator should obtain rights commensurate with and proportional to the value of his contribution* (my emphasis).[136]

Why does Merges opt to frame proportionality as part of the four mid-level principles, and moreover, the most important principle? He sets out his reasons early in chapter 6:

> I have chosen to emphasize proportionality for two reasons. First, it is the most undertheorized of the four midlevel principles. […] Proportionality is rarely identified as a stand-alone principle […] Second, I believe the proportionality principle illustrates exceedingly well what a midlevel principle is. *Proportionality sits solidly between lower-level principles, or foundational theory, and the detailed practices of IP law – the rules and institutions that apply this body of law to real-world problems* (my emphasis).[137]

These conceptions of the proportionality principle in intellectual property that Merges discuss are in the context of American intellectual property law – yet, they are also applicable to rights in intellectual property irrespective of jurisdiction. For Merges, proportionality not only justifies intellectual property, but it also explains some of the legal restrictions surrounding intellectual property. Furthermore, for Merges, proportionality acts as a foundation to support general principles in intellectual property.[138] Merges' discussion of the proportionality principle is important given that in different legal orders such as the European legal system, and or international law, the proportionality principle is important. Thus, in this context, to what extent is the proportionality principle present in

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[134] Merges (n 20) 7, and at 8 explaining that "the proportionality principle" is clearly linked to Locke.
[135] *Ibid*, 8; and at 150 (explaining the scope of the proportionality principle).
[136] *Ibid*, 130. Merges also frames the proportionality principle against leveraging or the disproportionate leveraging of intellectual property rights, *ibid*, 162.
[137] *Ibid*, 159, and at 160 explaining how "the proportionality principle ties together all sorts of disparate rules and institutional features in the IP landscape".
[138] Pila (n 98) offering an analysis of the proportionality principle from a European perspective. Merges notes that his discussion on the proportionality principle emanates from the work of Jules Coleman, Merges, *ibid*, 160; Jules Coleman, *The Practice of Principle* (OUP, 2001). An earlier work by Resnik (n 68) developed similarly the arguments of Merges on the proportionality principle, and Pila, for instance, has been critical of Merges' *slight appropriation* of Resnik's work, Pila (n 98) 200. Unfortunately, there is no citation or mention of Resnik's work in Merges' book.

international intellectual property law? It is against this background that I sketch out briefly the proportionality principle from an international intellectual property law perspective.

The proportionality principle in international law is well established and can be found in various regimes of international law[139] – from international humanitarian law[140] to international investment law.[141] As a general principle "proportionality means that a State's acts must be a rational and reasonable exercise of means towards achieving a permissible goal, without unduly encroaching on protected rights of either the individual or another State."[142] The principle of proportionality invokes a sort of *just* approach to the exercise and use of international law (or the legal instruments that makes up international legal relations) reflecting domestic traits on fairness and justice.[143] Furthermore, international law recognises the principle of proportionality as a balancing act between "the effects of measures chosen against the objective sought."[144] As the principle of proportionality expands and engulfs different regimes in international law – its underlying role appears to be a special link that binds the constitutive formation of the various regimes in international law. If this is the case, then, the arguments by Merges on the liberal expansion of rights in intellectual property; where proportionality shows up in all the various intellectual property rules; are transposing intellectual property constitutionalism from the domestic level to the international level. That transposition, is, in the sense, that there are numerous international treaties, bilateral treaties and regional treaties on intellectual property. But, although the proportionality principle is well established in different regimes in international law, it is not so clear cut what the situation is in regards to the principle of proportionality in international intellectual property law. It is fairly a new phenomenon mostly associated with the post-TRIPs system of international intellectual property law.[145]

Prior to the TRIPS Agreement, there was not a concerted effort *per se* to search for harmonisation or any balanced form of international intellectual property rules. The pre-TRIPS international intellectual property treaty system, such as the Paris and Berne Conventions, were designed primarily for specific intellectual property regime – example, the Berne Convention for the copyright regime. Little, if any harmonisation were achieved under *singular aim* intellectual property treaties. The situation changed dramatically with the TRIPs Agreement, as various agendas and competing interests; and the need for a globalised and harmonised system of intellectual property rules; even if it meant such harmonisation were *de minimis,* were advanced. Moreover, TRIPs provided for a broader policy context of intellectual property at the international level as opposed to the policy context of intellectual property rules at the domestic level and this gives the TRIPsS a stimulus to reach out to the general proportionality principles present in the broader forum of international law.

The general principle of proportionality in international law was attractive to international intellectual property rules in the post-TRIPs era because the central actors in intellectual property – owners – began to see their economic participation in the international economic system were aligning with the objectives of states. Intellectual property owners expect that in light of the expanding nature of international trade – they are entitled to reasonable returns that are proportional to their investment. On the one hand, the interests of states, from the perspective of intellectual property in the

[139] Michael Newton and Larry May, *Proportionality in International Law* (OUP, 2014); *Gabcikovo-Nagymaros Project* (Hungary/Slovakia) ICJ Reports 1997 [85] (accepting the existence of the proportionality principle in international law).
[140] Judith Gardam, "Proportionality and Force in International Law" (1993) 87 *American Journal of International Law* 391.
[141] Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (CUP, 2015).
[142] Emily Crawford, "Proportionality" in *Max Planck Encyclopaedia of Public International Law* (OUP, 2012).
[143] Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar, 2014) chapter 4.
[144] Crawford (n 142).
[145] This is so because new trading arranging of the TRIPS and WTO essentially forced countries to adopt a number of legislations that are TRIPS compliance, see Mandel (n 155) discussing leveraging in general.

international economic system was about the promotion of trade; investments and economic growth. And on the other, the interests of intellectual property owners, was the reward they can reap from their intellectual property investments in the expanding world of economic opportunities. For intellectual property owners, they are more inclined to view their rights as also providing a benefit to society, in that, their economic returns on their investments are proportional to the benefits they receive in light of international rules. Thus, it was also incumbent on them to ensure that their legitimate interests in the international intellectual property system were guaranteed under some form of harmonised rules – backed by states. These varied interests for states and intellectual property owners were therefore suitable for intellectual property owners where the general principle of proportionality was in the middle; acting as the gate keeper of fairness and justice in terms of how the states enforce intellectual property rules, and how the remedies for intellectual property violations were applied. Seen in this context – one effect of the proportionality principle in international intellectual property is that it opens up genuine discussions on the scope of rights in intellectual property.

So, how can proportionality be considered as part of international intellectual property law in light of the above discussion? The starting point is the terms and scope of the TRIPS Agreement. The various provisions of the TRIPS Agreement – are in fact – a norm setting conveyor belt that is designed around proportionality as principle. What I mean by this is that there is no single provision in the TRIPS Agreement that can be specifically singled out as containing the principle of proportionality. Rather, various TRIPS norms "include broad and undefined legal concepts such as reasonableness, legitimate interests, or necessity"[146] forms part of the TRIPs proportionality paradigm. Part of the reason for this is because the TRIPS Agreement, from its very beginning, was an exercise not only to harmonise, but also to balance the various interests of states and intellectual property owners. The most direct reference to proportionality in the TRIPS Agreement can be found in Article 46 where it calls for the "need of proportionality" as part of other remedies in enforcing intellectual property.[147] But given the complexity of the TRIPS Agreement – in that it is a *compromise* between states and intellectual property owners to "balance rights and obligations"[148] then, proportionality in the TRIPS Agreement must be seen in the context of specific TRIPS provisions. In other words, proportionality in Article XYZ may not mean the same in Article ZYX. Therefore, there is conflict of interest in the TRIPS Agreement, from both a policy perspective and a legal perspective, in relation to proportionality in international intellectual property rules. Thus, attempts to find a balance between these two positions are likely to be based on a careful analysis of the objectives and functions of specific TRIPS provisions.

To apply the proportionality principle test in the TRIPS Agreement – different factors have to be considered. These factors have a common denominator: legitimate aim (interests); necessity; suitability and proportionality *stricto sensu*. What these common elements must take into consideration are the right of the state, as enshrined in an international agreement (this case the TRIPS – and broadly the WTO) to intervene in the rights to the covered intellectual property; and then, avoid too drastic an intervention that eradicate the covered right in the first place. Furthermore, applying proportionality *stricto sensu* must weigh the gains of an intervention in the covered right. To put it another way – what are the net benefits of compulsory licensing for patented medicines when the owners are expecting a just reward for their investments? That is the situation a judicial body will find itself in when there is a need to analyse the proportionality principle: the need for the balancing

[146] Henning Ruse-Khan, "Proportionality and Balancing Within the Objectives" in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer, 2008) 169.
[147] TRIPS Agreement, Article 46.
[148] *Ibid*, Article 7.

of public welfare (access to medicine), and how the negative effects of compulsory licensing for granting access affects the intellectual property owner.

A final argument in relation to the proportionality principle in international intellectual property law is its relationship to WTO law (where the TRIPS Agreement is part of the WTO). This is a broader discussion that cannot be completely addressed in this section, suffice to say that, if the proportionality principle is a general principle recognised in international law – does it mean that the proportionality principle is a recognised principle in WTO law? According to the WTO Agreement – its covered agreements including the TRIPS are to be interpreted in light of international law.[149] Furthermore, various Panels and Appellate Body reports have confirmed that WTO rules are part of general international law. Given that the proportionality principle in the TRIPS Agreement, are to be gleaned from various articles, and not a single provision *per se*, this raises the question, as to whether proportionality is a general principle of WTO law, or only, deemed to occur only in specific circumstances when the TRIPS Agreement is being interpreted. For some academic scholars who have examined the relationship of proportionality and WTO law, they are not convinced that the principle of proportionality is applicable to WTO law – but rather can serve as guiding interpretative principle.[150] For supporters of the principle of proportionality in the WTO – they believe that one of the test for proportionality – necessity – should be construed as the correct way to interpret the proportionality principle in the WTO.[151] This schism in the academic jurisprudence on the existence of the proportionality principle in the WTO reflects only the fact that the proportionality principle is inherently complex. The few intellectual property disputes in the WTO that have engaged *proportionality* or the provisions in the TRIPS that reflects proportionality, those decisions generally veered towards only one of the tests for proportionality. For example in *Canada – Patents*, the Panel defined "legitimate interests" as a normative claim, it also cautioned that it could not embraced the definition of legitimate interests in a legal sense.[152] Perhaps, it is no coincidence that the only case in the WTO that could have settled the question, as to whether the proportionality principle is part of WTO law, in the same fashion that the proportionality principle is recognised in public international law, was settled before it could have been litigated regarding access to medicine and the HIV epidemic in South Africa in the 1990s.[153]

3. The *leverage point consensus* of international intellectual property

In this section I examine intellectual property law in the context of traditional public international law by incorporating the discussions in the previous sections. Ideally, the goal is to demonstrate, without going into the technical interactions of international intellectual property and international law, that intellectual property rights are *leveraging* tools in international law. This leveraging phenomenon is then resulted in the privatisation of international law. In the discussion so far, we have looked at the justification for property rights against the major libertarian thoughts (Lockean, Hohfeldian, Rawlsian) and intellectual property in the modern context (Mergesian). It must also be noted that private law (including private international law) and the realm of public law (including public

[149] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the WTO Agreement, Article 3.2.
[150] Axel Desmedt, "Proportionality in WTO Law" (2001) 4 *Journal of International Economic Law* 441, 477.
[151] Eg, Andrew Mitchell, *Legal Principles in WTO Disputes* (CUP, 2008).
[152] *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R, 17 March 2000 [7.69].
[153] *Pharmaceutical Manufactures' Association of South Africa v President of the Republic of South Africa*, Case No 4183/98 (field 18 February 19998); *Minister of Health and Others v Treatment Action Campaign and Others*, 2002 (2) SA 717; the Doha Declaration (2001) arose in part because of *South Africa's Medicine Act* (1997) which was amended to include provisions for access to medicine – a law that Western pharmaceutical found unacceptable. See *Medicines and Related Substances Control Amendment Act No. 90 of 1997*, South Africa.

international law) has a distinctive history, whereas, it is generally seen that public international law emerged from private international law: the *ius civile* versus *ius gentium* dichotomy. That relationship is crucial because *private state relations* (conflict of laws/private international law) gradually became a concern of activities beyond state borders in which the laws governing state relations (law of nations/public international law) had to respond to.[154] *Arguendo*, property rights give rise to private law and private law give rise to the law of nations.

Most countries in the world today have economies that are built on various forms of market liberalism where individualism, freedom of choice and international trade is cornerstone to their economic development or their expansion of wealth. Property rights in the form of intellectual property are key to this economic development or wealth expansion. Hence, it is under these circumstances that intellectual property owners can leverage their rights within the boundaries of the external law governing state relations. This leveraging of intellectual property through external law of state relations opens up corridors to various disputes among states concerning the "domestic impact of particular intellectual property regimes for individual states and their citizens"[155] usually through the application of international law. In this grand leveraging technique, the protection of intellectual property within the internal borders of the state is paramount; and so too, is the state and nature of the international legal regime for intellectual property. Thus, the broader scope of international law is reduced to remedial measures for private rights owners as opposed to the interests of *all* states.

International law in general function as an arbiter of disputes among states. The various regimes of international law are given priority based on the nature of the dispute. Disputes on armed conflicts generally requires the invocation of international humanitarian law, and disputes concerning patents in the international economic system may involve a myriad of treaties.[156] The point is – for international law to function and respond to the claims and counterclaims in the modern world – it has specific treaty regimes to leverage and therefore respond adequately to various disputes. But, there is also another leverage point that international law has at its advantage in responding to global disputes: the state of domestic law in relation to the dispute. Furthermore, international law must consider what is the nature of the governance structure at the domestic level and how that governance structure relates to key developments at the international level. Another point is how can international law function properly without interfering the sovereignty of the domestic state.[157] The sovereignty question is more problematic, as any perceived interference in the political operations and legal policy making of the domestic state using international law can be construe as *sovereignty interference*. However, states which voluntarily participates in the international economic system leverage various rules in the economic domain to serve the proper function of international law – remedial consensus – that confirms the objectives of states participation in international law. The participation of states in the international economic system serves a primary objective of economic wealth maximisation; where rules provides for a level playing field and provides incentives and opportunities for goods and services. Such opportunities are grounded in the ownership of private property rights that are granted through the power of the state to legislate.

The leverage point consensus of states in the international economic system that I briefly highlighted above can be demonstrated through the international intellectual property protection of patents. According to Article 271(1) of the TRIPS Agreement – WTO members are required to make patents

[154] Eg, Alfred Rubin, "Private and Public History: Private and Public Law" (1988) 82 *Proceedings of the American Society of International Law* 30.
[155] Gregory Mandel, "Leveraging the International Economy of Intellectual Property" (2014) 75 *Ohio State Law Journal* 733, 734-5.
[156] Eg, the Paris Convention for the Protection of Industrial Property (revised at Stockholm) 828 UNTS 305; the Patent Cooperation Treaty, 19 June 1970, 1160 UNTS 231; the Vienna Convention on the Law of Treaties, 1155 UNTS 331.
[157] For the purposes of this article – I will refer to these as the *leverage point consensus*.

"available for any inventions, whether products or processes, in all fields of technology."[158] This is the first leverage point consensus – *the state of domestic law* – in that states are required to have domestic laws for patents. Thus, if states had no prior patent laws, and subsequently signed up to the TRIPS Agreement – they are expected to fulfil this TRIPS obligation. A further provision of Article 17(1) of the TRIPS Agreement, notes that, for patents to be available, they are to fulfil certain conditions: in that, a patent must be "new, involve an inventive step and are capable of industrial application."[159] To determine these criteria domestically, the state, must, in addition to patent laws, set up institutions that can determine new patents, their non-obviousness (inventive step) and use (industrial application). This requires a further leverage point consensus – *institutions with governance structures* – that mirrors international institutions such as the WIPO (or regional in some cases, example the European Patent Office (EPO)). Most domestic patent offices, or those that were non-existent prior to the TRIPS – have streamlined their governance structures to reflect the WIPO and the EPO. Moreover, the WIPO have had various programs to train and ensure that the eligibility criteria for patents meets the most basic requirements set out the TRIPS Agreement. The third and final leverage point consensus is the nature of patents within international law – that is under the TRIPS Agreement – as an instrument of international law. Thus, further in Article 27(1) "patents shall be available and patent rights enjoyable *without discrimination as to the place of invention*, the field technology and *whether products are imported or locally produced*."[160] What this provision tells us, is that, patents are also responsible for international trade – in that, the goods covered by patents are tradeable in the international economic system and such goods should not be discriminated against; and is, therefore, a leverage point consensus under international law. In other words, the TRIPS Agreement must able to function in such a way that it does not interfere in the sovereignty of a nation if patentable goods in international trade are discriminated against.

The patent provisions of the TRIPS Agreement have had an effect on the state of domestic laws in relation to patents, in that, they have either required states to implement patent laws, where there were none before. Furthermore, states with patent laws at the time of the TRIPS Agreement, had to improve their legislations to meet the TRIPS criteria. Given that the TRIPS Agreement has been seen as a developed state centric treaty, then the domestic patent law of those states are arguable reflected in the TRIPS – which non-developed states would be required to meet. In other words, the patent laws of XYZ states were *imposed* upon ZYX states.[161] The criteria for patents are basically uniform in most of the developed countries, especially countries that are responsible for more than 80 percent of the world patent applications and granting.[162] These same states (the US, Japan,[163] Korea,[164] Europe[165] and China[166]) are responsible for most of the world trading volume – and except for China, were the main protagonists of the TRIPS Agreement. The criteria for patents (eligibility) in the domestic laws of the developed states may vary slightly, and only in relation to the *type* of patents. For instance, although the UK generally adheres to the patent eligibility criteria of the EPO, it has developed its own test based on "novelty", "inventive step", "prior art", and "technical contribution".[167] In the US, a patent can be granted for inventions covering, process, machine, manufacture, or composition of

[158] TRIPS Agreement, Article 27(1).
[159] *Ibid.*
[160] *Ibid* (my emphasis).
[161] Some writers have labelled such actions as coercion, see Srividya Janhyala, "International and Domestic Dynamics of Intellectual Property Protection" (2015) 50 *Journal of World Business* 284, 287.
[162] *IP5 Statistics Report 2015 Edition* (Edited by JPO, 2016).
[163] Japan Patent Law, *Act No. 121 of 1959* (amended to 2015).
[164] Korea Patent Law, *Law No. 950*, 31 December 1961 (amended to 2013).
[165] Convention on the Grant of European Patents, 13 ILM 270, 5 October 1973. See Article 52(1) mirroring Article 27(1) of the TRIPS Agreement. Furthermore, the EPC established the EPO, for which national patent offices are members (branches).
[166] *Patent Law of the People's Republic of China*, 12 March 1984) (amended to 2008).
[167] Manual of Patent Practice (UK Patent Act 1977), Section 1: Patentability, September 2017.

matter,[168] and in Japan, patents are granted for "highly advanced creations".[169] These slight differences on the patent eligibility criteria in the developed states merely reflects the type of patent sought. As such, the actual grant of a patent through the state's power to legislate (patent laws) that promotes economic growth and innovation (property rights in patents to private owners) is merely part of the leveraging process in intellectual property. Without the various leverage consensus points in the patent chain – to paraphrase Mark Twain – a country is just a "crab"[170] and would be excluded from the gains in international trade where intellectual property rights are enforced.

Given that the TRIPS Agreement is an international treaty and forms part of the WTO treaty system – a pertinent question arise in the context of the leverage point consensus argument – whose interest it was for the inclusion of intellectual property rights in the WTO system? The states or private interests (the owners of intellectual property rights)? There is abundant literature that discussed the private interests of intellectual property owners as using their coercive powers through ownership that allowed for the inclusion of the TRIPS in the WTO.[171] However, what has not been discussed is whether states had had a genuine interest in the TRIPS Agreement – without any form of coercion. I believe that the moving tides of international trade and the rules, that evolved to form the WTO system, allowed states to leverage, not on international rules on trade in goods, but also rules on the international intellectual property regime. States did not want to be seen as *meandering crab*, rather, they wanted to be part of the club and exercise their ability to shape the global rules on the economic system. The TRIPS Agreement represented a platform for states to transplant the domestic rights enshrined on intellectual property beyond the borders of the nation state – so that there could be net benefits for the state in terms of economic investments and also, as champions of market liberalism that intellectual property rights represents. The global *pandemic* of trade liberalisation was re-shaping the international economic system, and accompanying that pandemic was the scope of property rights, that would now represent *global goods*, and those rights had to be backed by states. Had states not backed the system of domestic rights that were now migrating to the international plane – they would have been seen as *diluting* property rights. Thus, for states, property rights in the TRIPS Agreement represents a continuum of private property rights. States realised that a comprehensive international regulatory structure, was a formal acknowledgement, of the new era of a *pluralistic liberalism*. Essential to the new era was how market transactions leads to more gains, and the behavioural norms of states in their relations with other states, especially when dealing with goods and economic resources because of intellectual labour. Thus, states, by signing up to the new regulatory framework of intellectual property in TRIPS opened new opportunities for transactions in new technological developments, goods and medicine,[172] that were otherwise inaccessible due to weak or no intellectual property framework. Both individuals and states were now capable of leveraging intellectual property rights.[173]

The emergence of the post-TRIPS international intellectual property rules allowed private economic rights in intellectual property "to be seen as a national and international enterprise"[174] and at the same

[168] US Patent Act, 35 USCS Sects. 1 - 376, Section 101 on "inventions patentable".
[169] Japan Patents Act, Article 2(1).
[170] Mark Twain, *A Connecticut Yankee in King Arthur's Court* (Toronto: Rose Publishing Co., 1890) 107: "a country without a patent office and good patent laws was just a crab, and couldn't travel any way but sideways or backwards."
[171] Eg, Pater Drahos, "Global Property Rights in Information: The Story of TRIPS at the GATT" (1995) 13 *Prometheus* 6; Susan Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (CUP, 2003).
[172] Nistsan Chorev, "Changing Global Norms Through Reactive Diffusion: The Case of Intellectual Property Protection of AIDS Drugs" (2012) 77 *American Sociological Review* 831, 834 (arguing that "cross-national influence and collective accumulation of experiences" is crucial to transformation of global norms in the intellectual protection of AIDS drugs).
[173] Mandel (n 155); Mark Patterson, "When is Property Intellectual? The Leveraging Problem" (2000) 73 *Southern California Law Review* 1133.
[174] Steven Wilf, "The Making of the Post-War Paradigm in American Intellectual Property Law" (2008) 31 *Columbia Journal of Law and the Arts* 139.

time, reigniting old "doctrinal source of the tension between public concerns about monopoly and the vesting of private property rights in knowledge."[175] Yet, it is that same tension that allows for how states and private economic interests leverage intellectual property rights to their mutual advantage. As states and private economic interests compete for the *right* to international law in intellectual property – major tribunals such as the WTO Panels were also confirming that the TRIPS Agreement were to be seen within the spirit of international law.[176] The TRIPS Agreement, as *Canada – Patents* notes, is part of customary international law, and also international treaty law.[177] This was consistent with the broader consensus that the WTO covered agreements including the TRIPS Agreement were to be interpreted in accordance with customary rules of interpretation of public international law.[178] But as intellectual property expands and a rise in international trade relied more and more on international law – private economic interests were turning to international intellectual property rules as part of public international to law to erect enforcement barriers around their private rights in intellectual property. The most contentious issue in recent times has been the property rights in trademarks as part of international investments.[179] The property rights in trademarks through investments were now drawing battle lines among the competing interests in intellectual property at the international level. Those interests are primarily to have a more uniform protection of intellectual property rights globally; effective reinforcements of such rights; and that such rights do not become barriers to legitimate trade.[180]

E. Conclusion

This article argued that the philosophical foundations of property rights served as the fundamental basis to understand the ideological premise to justify intellectual property and its behavioural pattern in the international economic system. As shown above, intellectual property rights are justified in a Rawlsian sense, but, the deep legal contents of intellectual property rights require Hohfeldian legal analysis given that *rights* in the strict legal sense depended on the jural relations (laws and legal systems) in a state. Furthermore, it has been established that the coercive (exclusive) nature of intellectual property enabled private owners to engage the power of states to shape the wider legislative and treaty system of intellectual property. The result is the privatisation of international law through intellectual property enforcement and regulation. . The right to have rights in international intellectual property presupposes a fundamental right in international law, whereas, the latter was now responding to the private legal rights of economic interests and changing the contours of public international law. By engaging in the ideological premise of intellectual property the article provided a rich insight on the rights paradigm in real property theories and the contemporary justification of intellectual property that involved various regimes with different interests and agendas. The underlying theme, or link that holds the various intellectual property regime together is the state guarantee of rights to property in a free market society with democratic values The three lines of theoretical background developed in this article (Hofeldian, Rawlsian, and Mergesian) moreover supported the claim that the justification of intellectual property rights represents continuity in the liberal thought – and helps to maintain the ideological premise that intellectual property are special private rights that requires special protection in the international legal order.

[175] *Ibid*, 141.
[176] *Canada – Patents* (n 152) [4.12], [5.5].
[177] *Ibid*, note 40.
[178] Article 3(2), DSU (n 149).
[179] *Plain – Packaging* (n 83).
[180] TRIPs Agreement, recital 1; *Canada – Patents* (n 152) confirming that the TRIPS Agreement embodies the balance of interest in the context of international trade [5.3], [5.5].